This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

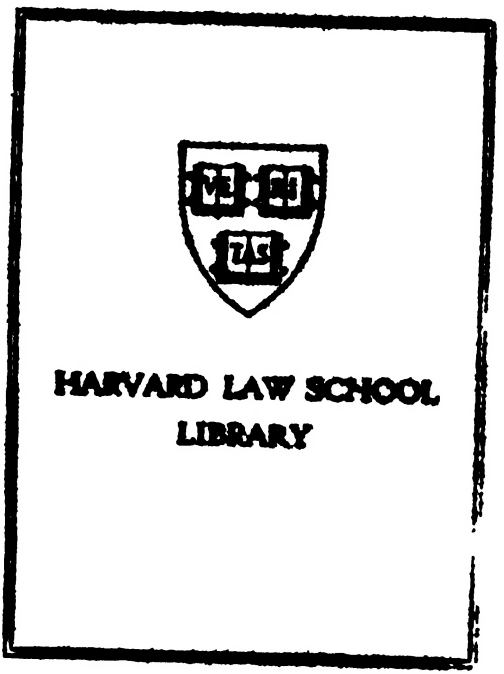
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

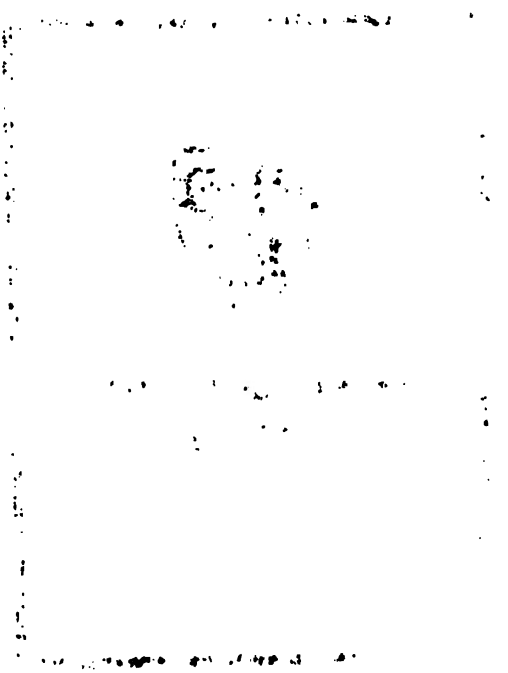
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at http://books.google.com/


HARVARD LAW SCHOOL
LIBRARY



46
Ayr 29

REPORTS OF CASES

DETERMINED IN THE

APPELLATE COURTS

OF ILLINOIS

WITH A DIRECTORY OF THE JUDICIARY DEPARTMENT OF THE STATE, CORRECTED TO THE TWELFTH OF APRIL, 1903, AND A TABLE OF CASES REVIEWED BY THE SUPREME COURT TO THE DATE OF THE PUBLICATION OF THIS VOLUME.

VOL. CV.

A. D. 1903

EDITED BY

MARTIN L. NEWELL

AUTHOR OF "THE LAW OF LIBEL AND SLANDER," "A TREATISE UPON THE LAW OF EJECTMENT," ETC.

AND

MASON H. NEWELL, M. A., LL. B.

CHICAGO
CALLAGHAN & COMPANY
1903

Entered according to act of Congress, in the year 1903.
By CALLAGHAN & COMPANY,
In the office of the Librarian of Congress, at Washington, D. C.

Rec. May 25, 1903.

Stereotyped and Printed
by the
Chicago Legal News Company.

DIRECTORY OF THE JUDICIARY DEPARTMENT OF THE STATE OF ILLINOIS.

CORRECTED TO APRIL 12, 1908.

The judiciary department of the State of Illinois is composed of (1) the Supreme Court; (2) the Appellate Courts; (3) Circuit Courts; (4) Courts of Cook County; (5) City Courts; (6) County and Probate Courts.

(1) THE SUPREME COURT.

The Supreme Court consists of seven justices, elected for a term of nine years, one from each of the seven districts into which the State is divided.

Formerly the State was divided into three grand divisions, Southern, Central and Northern, in which the terms were held, with one clerk for each of the three grand divisions elected for a term of six years, the court sitting at Mt. Vernon, Springfield and Ottawa.

In 1897 these divisions were consolidated into one comprising the entire State, and provision made that all terms of the court be held in the city of Springfield, on the first Tuesday in October, December, February, April and June of each year.

REPORTER.

ISAAC N. PHILLIPS.....Bloomington.

JUSTICES.

First District—CARROLL C. BOGGS.....Fairfield.
Second District—JAMES B. RICKS.....Taylorville.
Third District—JACOB W. WILKIN.....Danville.
Fourth District—JOSEPH N. CARTER.....Quincy.
Fifth District—JOHN P. HAND.....Cambridge.
Sixth District—JAMES H. CARTWRIGHT.....Oregon.
Seventh District—BENJAMIN D. MAGRUDER.....Chicago.

The Chief Justice is chosen by the court, annually, at the June term. The rule of the court is to select as successor to the presiding justice the justice next in order of seniority who has not served as Chief Justice within six years last past. Mr. Justice Magruder is the present Chief Justice.

CLERK.

CHRISTOPHER MAMER, 158 Throop St., Chicago.

LIBRARIAN.

RALPH H. WILKIN, Robinson.

(2) APPELLATE COURTS.

These Courts are held by Judges of the Circuit Courts assigned by the Supreme Court for a term of three years. One Clerk is elected in each district.

REPORTER.

MARTIN L. NEWELL.....Springfield.

FIRST DISTRICT.

Composed of the county of Cook.
Court sits at Chicago on the first Tuesdays of March and October.
CLERK—Alfred R. Porter, Ashland Block, Chicago.

FARLIN Q. BALL, Presiding Justice, Ashland Block, Chicago.
FRANCIS ADAMS, Justice, Ashland Block, Chicago.
THOMAS G. WINDES, Justice, Ashland Block, Chicago.

BRANCH APPELLATE COURT.*

FIRST DISTRICT.

ARBA N. WATERMAN, Presiding Justice, Ashland Block, Chicago.
EDMUND W. BURKE, Justice, Ashland Block, Chicago
HENRY V. FREEMAN, Justice, Ashland Block, Chicago.

APPELLATE COURTS—(CONTINUED.)

SECOND DISTRICT.

Composed of the Northern Grand Division of the Supreme Court, except Cook county.
Court sits at Ottawa, La Salle county, on the first Tuesdays in April and October.
CLERK—Christopher C. Duffy, Ottawa.

GEORGE W. BROWN, Presiding Justice, Wheaton.
HARRY HIGBEE, Justice, Pittsfield.
DORRANCE DIBELL, Justice, Joliet.

THIRD DISTRICT.

Composed of the Central Grand Division of the Supreme Court.
Court sits at Springfield, Sangamon county, on the third Tuesdays in May and November.
CLERK—W. C. Hippard, Springfield.

FRANCIS M. WRIGHT, Presiding Justice, Urbana.†
OLIVER A. HARKER, Justice, Carbondale.
BENJAMIN R. BURROUGHS, Justice, Edwardsville.

* This court is a branch of the Appellate Court of the first district, and is held by three judges of the Circuit Court, designated and assigned by the Supreme Court under the provisions of the act of the General Assembly, approved June 2, 1897. Hurd's Statute, 1897, 508, Laws of 1897, 135.
† Resigned.

FOURTH DISTRICT.

Composed of the Southern Grand Division of the Supreme Court.
Court sits at Mount Vernon, Jefferson county, on the fourth Tuesdays in February and August.
CLERK—Albert C. Millapaugh, Mount Vernon.

HIRAM BIGELOW, Presiding Justice, Galva.
JAMES A. CREIGHTON, Justice, Springfield.
NICHOLAS E. WORTHINGTON, Justice, Peoria.

(3) CIRCUIT COURTS.

Exclusive of Cook county, the State of Illinois is divided into Seventeen Judicial Circuits, as follows: *

First Circuit.—The counties of Alexander, Pulaski, Massac, Pope, Johnson, Union, Jackson, Williamson and Saline.

JUDGES.

JOSEPH P. ROBARTS, Cairo.
OLIVER A. HARKER, Carbondale.
ALONZO K. VICKERS, Vienna.

Second Circuit.—The counties of Hardin, Gallatin, White, Hamilton, Franklin, Wabash, Edwards, Wayne, Jefferson, Richland, Lawrence and Crawford.

JUDGES.

EDMUND D. YOUNGBLOOD, Mount Vernon.
PRINCE A. PEARCE, Carmi.
ENOCH E. NEWLIN, Robinson.

Third Circuit.—The counties of Randolph, Monroe, St. Clair, Madison, Bond, Washington and Perry.

JUDGES.

BENJAMIN R. BURROUGHS, Edwardsville.
WILLIAM P. EARLY, Edwardsville.
WILLIAM HARTZELL, Chester.

Fourth Circuit.—The counties of Clinton, Marion, Clay, Fayette, Effingham, Jasper, Montgomery, Shelby and Christian.

JUDGES.

WILLIAM M. FARMER, Vandalia.
TRUMAN E. AMES, Shelbyville.
SAMUEL L. DWIGHT, Centralia.

Fifth Circuit.—The counties of Vermilion, Edgar, Clark, Cumberland and Coles.

JUDGES.

HENRY VAN SELLAR, Paris.
M. W. THOMPSON, Danville.
FRANK K. DUNN, Charleston.

Sixth Circuit.—The counties of Champaign, Douglas, Moultrie, Macon, DeWitt and Piatt.

JUDGES.

SOLON PHILBRICK, Champaign.
EDWARD P. VAIL, Decatur.
WILLIAM G. COCHRAN, Sullivan.

* Laws 1897, 188.

Seventh Circuit.—The counties of Sangamon, Macoupin, Morgan, Scott, Greene and Jersey.

JUDGES.

JAMES A. CREIGHTON, Springfield.
ROBERT B. SHIRLEY, Carlinville.
OWEN P. THOMPSON, Jacksonville.

Eighth Circuit.—The counties of Adams, Schuyler, Mason, Cass, Brown, Pike, Calhoun and Menard.

JUDGES.

JOHN C. BROADY, Quincy.
HARRY HIGBEE, Pittsfield.
THOMAS N. MEHAN, Mason City.

Ninth Circuit.—The counties of Knox, Warren, Henderson, Hancock, McDonough and Fulton.

JUDGES.

JOHN J. GLENN, Monmouth.
GEORGE W. THOMPSON, Galesburg.
JOHN A. GRAY, Canton.

Tenth Circuit.—The counties of Peoria, Marshall, Putnam, Stark and Tazewell.

JUDGES.

LESLIE D. PUTERBAUGH, Peoria.
THEODORE N. GREEN, Pekin.
NICHOLAS E. WORTHINGTON, Peoria.

Eleventh Circuit.—The counties of McLean, Livingston, Logan, Ford and Woodford.

JUDGES.

COLOSTIN D. MYERS, Bloomington.
GEORGE W. PATTON, Pontiac.
JOHN H. MOFFETT, Paxton.

Twelfth Circuit.—The counties of Will, Kankakee and Iroquois.

JUDGES.

DORRANCE DIBELL, Joliet.
ROBERT W. HILSCHER, Watseka.
JOHN SMALL, Kankakee.

Thirteenth Circuit.—The counties of Bureau, LaSalle and Grundy.

JUDGES.

CHARLES BLANCHARD, Ottawa.
HARVEY M. TRIMBLE, Princeton.
SAMUEL C. STOUGH, Morris.

Fourteenth Circuit.—The counties of Rock Island, Mercer, Whiteside and Henry.

JUDGES.

HIRAM BIGELOW, Galva.
WILLIAM H. GEST, Rock Island.
FRANK D. RAMSAY, Morrison.

Fifteenth Circuit.—The counties of Jo Daviess, Stephenson, Carroll, Ogle and Lee.

JUDGES.

RICHARD S. FARRAND, Dixon.
JAMES SHAW, Mount Carroll.
JAMES S. BAUME, Galena.

Sixteenth Circuit.—The counties of Kane, Du Page, De Kalb and Kendall.

JUDGES.

HENRY B. WILLIS, Elgin.
CHARLES A. BISHOP, Sycamore.
GEORGE W. BROWN, Wheaton.

Seventeenth Circuit.—The counties of Winnebago, Boone, McHenry and Lake.

JUDGES.

ARTHUR H. FROST, Rockford.
CHARLES E. FULLER, Belvidere.
CHARLES H. DONNELLY, Woodstock.

(4) COURTS OF COOK COUNTY.

The State Constitution recognizes Cook county as one judicial circuit, and establishes the Circuit, Criminal and Superior Courts of said county. The Criminal Court has the jurisdiction of a Circuit Court in criminal and quasi-criminal cases only, and the judges of the Circuit and Superior Courts are judges, *ex-officio*, of the Criminal Court.

CIRCUIT COURT.

CLERK—John A. Cooke, County Building, Chicago.

JUDGES.

EDWARD F. DUNNE,
MURRAY F. TULEY,
RICHARD S. TUTHILL,
FRANCIS ADAMS,
ARBA N. WATERMAN,
ELBRIDGE HANECY,
OLIVER H. HORTON,
JOHN GIBBONS,
RICHARD W. CLIFFORD,
THOMAS G. WINDES,
EDMUND W. BURKE,
CHARLES G. NEELY,
FRANK BAKER,
ABNER SMITH.

SUPERIOR COURT.

CLERK—John A. Linn, County Building, Chicago.

JUDGES.

THEODORE BRENTANO,
HENRY M. SHEPARD,
PHILIP STEIN,
JESSE HOLDOM,
JONAS HUTCHINSON,
AXEL CHYTRAUS,
ARTHUR H. CHETLAIN,
HENRY V. FREEMAN,
WILLARD M. MCEWEN.
FARLIN Q. BALL,
JOSEPH E. GARY.
MARCUS KAVANAGH.

(5) CITY COURTS.

City Courts existing prior to the Constitution of 1870 were continued until abolished by the qualified voters of the city. These courts may now be established under Sec. 21 of Chap. 37, R. S., and when so established have concurrent jurisdiction within the city, with the Circuit Courts, in all civil and criminal cases, except treason and murder, and in appeals from justices of the peace residing within the city. (Hercules Iron Works v. E., J. & E. Ry. Co., 141 Ill. 497.)*

THE CITY COURT OF ALTON.

ALEXANDER W. HOPE, Judge. FRANCIS BRANDEWEIDE, Clerk.

THE CITY COURT OF AURORA.

JOHN L. HEALY, Judge. FRANK W. GREENAWAY, Clerk.

THE CITY COURT OF CANTON.

P. W. GALLAGHER, Judge. HARRY C. MORAN, Clerk.

THE CITY COURT OF EAST ST. LOUIS.

SILAS COOK, Judge. THOMAS J. HEALY, Clerk.

THE CITY COURT OF ELGIN.

JOHN L. HEALY, Judge. JOHN J. KELLY, Clerk.

THE CITY COURT OF LITCHFIELD.

PAUL MCWILLIAMS, Judge. HUGH HALL, Clerk.

THE CITY COURT OF MATTOON.

LAPSLEY C. HENLY, Judge. THOMAS M. LYTLE, Clerk.

*The act in relation to courts of record in cities, Par. 240 of Ch. 37, Hurd's R. S., 1899, gives city courts jurisdiction in probate matters. McKinstry v. Elliott, 89 Ill. App. 599.

(6) COUNTY AND PROBATE COURTS.

In the counties of Cook, Kane, La Salle, Peoria, Sangamon, St. Clair and Will, each having a population of over 70,000, probate courts are established, distinct from the county courts. In the other counties the county courts have jurisdiction in all matters of probate. (Laws 1881, 72.)

JUDGES.	COUNTIES.	COUNTY SEATS.
CHARLES B. MCCRORY	Adams	Quincy.
WILLIAM S. DEWEY	Alexander	Cairo.
JOSEPH STORY	Bond	Greenville.
WM. C. DE WOLF, JR	Boone	Belvidere.
S. A. HUBBARD	Brown	Mt. Sterling.
JOE A. DAVIS	Bureau	Princeton.
F. I. BEZALLION	Calhoun	Hardin.
ALVA F. WINGERT	Carroll	Mt. Carroll.
DARIUS N. WALKER	Cass	Virginia.
CALVIN C. STALEY	Champaign	Urbana.
JAMES A. FORRESTER	Christian	Taylorville.
EVERETT CONNELLY	Clark	Marshall.
JOHN R. BONNEY	Clay	Louisville.
JAMES ALLEN	Clinton	Carlyle.
T. N. COFER	Coles	Charleston.
ORRIN N. CARTER	Cook	Chicago.
CHARLES S. CUTTING, Pro. J.	Cook	Chicago.
AUSBY L. LOWE	Crawford	Robinson.
S. B. RARIDEN	Cumberland	Toledo.
WILLIAM L. POND	DeKalb	Sycamore.
L. R. HERRICK	DeWitt	Clinton.
WILLIAM W. REEVES	Douglas	Tuscola.
LINUS C. RUTH	DuPage	Wheaton.
WALTER S. LAMON	Edgar	Paris.
ISAAC W. IBBOTSON	Edwards	Albion.
DAVID L. WRIGHT	Effingham	Effingham.
BEVERLY W. HENRY	Fayette	Vandalia.
H. H. KERR	Ford	Paxton.
JAMES MOONEYHAM	Franklin	Benton.
W. SCOTT EDWARDS	Fulton	Lewistown.
MARSH WISEHEART	Gallatin	Shawneetown.
DAVID F. KING	Greene	Carrollton.
GEORGE W. HUSTON	Grundy	Morris.
CHAS. B. THOMAS	Hamilton	McLeansboro.
JOHN W. WILLIAMS	Hancock	Carthage.
MARCELLES TYER	Hardin	Elizabethtown.
RAUS COOPER	Henderson	Oquawka.
T. H. CHESLEY	Henry	Cambridge.
FRANK HARRY	Iroquois	Watseka.
WILLARD F. ELLIS	Jackson	Murphysboro.
I. D. SHAMHART	Jasper	Newton.
CONRAD SCHUEL	Jefferson	Mt. Vernon.
CHARLES S. WHITE	Jersey	Jerseyville.
WILLIAM RIPPIN	Jo Daviess	Galena.
W. Y. SMITH	Johnson	Vienna.
M. O. SOUTHWORTH	Kane	Geneva.
JOHN H. WILLIAMS, Pro. J.	Kane	Geneva.
ARTHUR W. DESELM	Kankakee	Kankakee.
WILLIAM HILL	Kendall	Yorkville.
J. D. WELSH	Knox	Galesburg.

JUDGES.	COUNTIES.	COUNTY SEATS.
DEWITT L. JONES	Lake	Waukegan.
WILLIAM H. HINEBAUGH	LaSalle	Ottawa.
ALBERT T. LARDIN, Pro. J.	LaSalle	Ottawa.
JASPER D. MADDING	Lawrence	Lawrenceville.
ROBERT H. SCOTT	Lee	Dixon.
CHARLES F. H. CARRITHERS	Livingston	Pontiac.
DONALD MCCORMICK	Logan	Lincoln.
ORPHEUS W. SMITH	Macon	Decatur.
JOHN B. VAUGHN	Macoupin	Carlinville.
JOHN F. HILLSKOTTER	Madison	Edwardsville.
CHAS. H. HOLT	Marion	Salem.
DANIEL H. GREGG	Marshall	Lacon.
JAMES A. MCCOMAS	Mason	Havana.
L. P. OAKES	Massac	Metropolis.
WILLIAM J. FRANKLIN	McDonough	Macomb.
ORSON H. GILLMORE	McHenry	Woodstock.
ROLLAND A. RUSSELL	McLean	Bloomington.
GEORGE B. WATKINS	Menard	Petersburg.
WILLIAM T. CHURCH	Mercer	Aledo.
PAUL C. BREY	Monroe	Waterloo.
M. J. MCMURRAY	Montgomery	Hillsboro.
CHARLES A. BARNES	Morgan	Jacksonville.
E. D. HUTCHINSON	Moultrie	Sullivan.
FRANK E. REED	Ogle	Oregon.
WILBERT I. SLEMMONS	Peoria	Peoria.
MARK M. BASSETT, Pro. J.	Peoria	Peoria.
R. W. S. WHEATLY	Perry	Pinckneyville.
F. M. SHONKWILER	Piatt	Monticello.
B. T. BRADBURN	Pike	Pittsfield.
WILLIAM A. WHITESIDE	Pope	Golconda.
JOHN D. BRISTOW	Pulaski	Mound City.
HENRY C. MILLS	Putnam	Hennepin.
LOVEJOY TAYLOR	Randolph	Chester.
JOHN A. MCNEIL	Richland	Olney.
ELMER E. PARMENTER	Rock Island	Rock Island.
JOHN L. THOMPSON	Saline	Harrisburg.
GEORGE W. MURRAY	Sangamon	Springfield.
WILLIAM H. COLBY, Pro. J.	Sangamon	Springfield.
H. V. TEEL	Schuyler	Rushville.
JAMES CALLANS	Scott	Winchester.
THOMAS H. RIGHTER	Shelby	Shelbyville.
BRADFORD F. THOMPSON	Stark	Toulon.
JOHN B. HAY	St. Clair	Belleville.
FRANK PERRIN, Pro. J.	St. Clair	Belleville.
A. J. CLARILY	Stephenson	Freeport.
JESSE BLACK, JR.	Tazewell	Pekin.
MONROE C. CRAWFORD	Union	Jonesboro.
J. MURRAY CLARK	Vermilion	Danville.
LYMAN LEEDS	Wabash	Mt. Carmel.
T. G. PEACOCK	Warren	Monmouth.
LEWIS BERNREUTER	Washington	Nashville.
JOHN R. HOLT	Wayne	Fairfield.
JOHN N. WILSON	White	Carmi.
HENRY C. WARD	Whiteside	Morrison.
DWIGHT C. HAVEN	Will	Joliet.
JOHN B. FITHIAN, Pro. J.	Will	Joliet.
RUFUS NEELEY,	Williamson	Marion.
RUFUS C. BAILEY	Winnebago	Rockford.
THOMAS KENNEDY	Woodford	Eureka.

TABLE OF CASES REPORTED.

A

Ætna Ins. Co. v. Jacobson 283
Aleshire v. Lee County Savings Bank 32
Alston Mfg. Co. v. Squair 238
Alton Grain Co. v. Norton 385
American Refuse Crematory Co. ats. Garden City Sand Co. 342
Arneson v. Haldane 589
Asay ats. Hillis 667
Ashley v. Heinrichs 102
Assets Realization Co. v. Wightman 618

B

Baker v. Murphy 151
Baltimore & O. S. W. R. R. Co. v. Ross 54
Bank of Commerce v. Miller 224
Bank of Montreal v. Waite 373
Barker v. Fitzgerald 536
Barrie v. King 426
Barrie & Son v. Frost 187
Bartlett ats. Wheaton 326
Billings ats. Wabash R. R. Co. 111
Blizzard v. Epkens 117
Bloomington, City of, ats. Wheeler 97
Board of Trade v. Weare 289
Boatman v. Boatman 40
Bothman ats. Griesheimer 585
Bourne ats. C., P. & St. L. Ry. Co. 27
Briggs ats. Mayor of City of Roodhouse 116
Byrne ats. I. C. R. R. Co. 96

C

Calhoun v. Tangany 23
Carthage, City of, v. Duvall 123
Carthage, City of, ats. Munsell 119
Central Lumber Co. ats. Richardson 358
Chicago & Alton R. R. Co. v. Flaherty 14
Chicago & Alton R. R. Co. v. Gore 16
Chicago & Alton R. R. Co. v. Hogan 136

Chicago & E. I. R. R. Co v. Donworth..... 400
Chicago & E. I. B. R. Co. v. Heerey..... 647
Chicago, B. & Q. R. R. Co. ats. Imes..... 87
Chicago City Ry. Co. v. Mauger..... 579
Chicago City Ry. Co. v. Osborne..... 462
Chicago, City of, v. Cook..... 353
Chicago, City of, v. Dickman..... 209
Chicago, City of, v. Lamb..... 204
Chicago, City of, v. Merwin..... 168
Chicago, City of, ats. Osburn..... 217
Chicago, City of, v. Vesey..... 191
Chicago House Wrecking Co. v. Durand..... 175
Chicago Packing & Provision Co. ats. Terry..... 668
Chicago, P. & St. L. Ry. Co. v. Bourne..... 27
Christopher & Simpson Co. v. Yeager..... 126
Churchill ats. Northwestern Mutual Ins. Co..... 159, 164
Cicero, Town of, v. The People..... 406
Cleveland, C., C. & St. L. R. R. Co. v. David..... 69
Cleveland, C., C. & St. L. R. R. Co. v. Hamilton..... 75
Cleveland, C., C. & St. L. R. R. Co. v. Hornsby..... 67
Cleveland, C., C. & St. L. Ry. Co. ats. City of Windsor..... 46
Collier v. Grey..... 485
Considine v. Lee..... 246
Consumers Company ats. Flood..... 559
Cook ats. City of Chicago..... 353
Coon Run Drainage and Levee District, In re..... 28
Corn Belt Nat. B. & L. Ass'n ats. Kellogg Newspaper Co..... 62
Custer v. Harmon..... 76

D

David ats. C., C., C. & St. L. R. R. Co..... 69
Davis v. Miller Signal Co..... 657
Dayton v. Kidder..... 107
Dick v. Zimmerman..... 615
Dickman ats. City of Chicago..... 209
Dolan ats. Mattoon Gas Light and Coke Co..... 1
Donworth ats. C. & E. I. R. R. Co..... 400
Durand ats. Chicago House Wrecking Co..... 175
Duvall ats. City of Carthage..... 123

E

Edwards v. Story..... 433
Eickstaedt v. Moses..... 634
Ellsworth v. Varnum..... 487
Epkens ats. Blizzard..... 117
Ermeling v. Gibson Canning Co..... 196
Ermeling v. Guy..... 196
Ermeling v. Horner..... 196

F

Fagner ats. Watson..... 52
Fairview-London Telephone Circuit ats. Village of London Mills.. 146
Farrar ats. Parmly..... 394
Farson v. Fogg..... 572
Fitzgerald ats. Barker..... 536
Fitzgerald v. Gore..... 242
Flaherty ats. C. & A. R. R. Co..... 14
Fleming ats. Harmison..... 43
Flood v. Consumers Company..... 559
Flood ats. Rush..... 182
Fogg ats. Farson..... 572
Friedman v. Verchofsky..... 414
Frink v. Potts..... 92
Frost ats. George Barrie & Son..... 187

G

Garden City Sand Co. v. American Refuse Crematory Co..... 842
Gerhards v. Johnson..... 65
Gibbs ats. Moulton..... 104
Gibson Canning Co. ats. Ermeling..... 196
Gillespie Home Township Mutual Fire Ins. Co. v. Prather..... 123
Ginsburg v. Morrall..... 213
Goldberg ats. Heinly..... 80
Gore ats. C. & A. R. R. Co..... 16
Gore ats. Fitzgerald..... 242
Gormley v. Hartray..... 625
Grey ats. Collier..... 485
Griesheimer v. Bothman..... 585
Gullett ats. McAyeal..... 155
Guy ats. Ermeling..... 196

H

Haldane ats. Arneson..... 589
Hamilton ats. C., C., C. & St. L. R. R. Co..... 75
Hamilton ats. Loftus..... 72, 75
Harding v. Harding..... 363
Harmison v. Fleming..... 43
Harmon ats. Custer..... 76
Hartray ats. Gormley..... 625
Heerey ats. C. & E. I. R. R. Co..... 647
Heinly v. Goldberg..... 80
Heinrichs ats. Ashley..... 102
Henderson v. Tobey..... 154
Hernreich v. Lidberg..... 495
Hettrick ats. Salzenstein..... 99
Hillis v. Asay..... 667
Hoffman ats. Spolek Denni Hlasatel..... 170

Hogan ats. C. & A. R. R. Co. ... 136
Holdroff v. Remlee. ... 671
Horner ats. Ermeling. ... 196
Hornsby ats. C., C., C. & St. L. R. R. Co. ... 67
Hutchinson v. Hutchinson. ... 349
Hutchinson v. Sine. ... 638

I

Iles v. Swank. ... 9
Illinois Central R. R. Co. v. Byrne. ... 96
Illinois Central R. R. Co. v. Seitz. ... 89
Illinois Steel Co. v. McNulty. ... 594
Imes v. C., B. & Q. R. R. Co. ... 37
Imperial Mfg. Co. v. Schwartz. ... 525

J

Jacobson ats. Ætna Ins. Co. ... 283
Johnson ats. Gerhards. ... 65
Johnson v. Mellhousin. ... 367

K

Kalberlah ats. Lemker. ... 445
Kellogg Newspaper Co. v. Corn Belt Nat. B. & L. Ass'n. ... 62
Kertz ats. Poehlmann. ... 249
Kidder ats. Dayton. ... 107
King ats. Barrie. ... 426
Kinnare ats. P., C., C. & St. L. Ry. Co. ... 566
Klicka v. Klicka. ... 369
Knights Templars & Masons Life Indemnity Co. v. Vail. ... 331
Kohn v. Warner. ... 321
Kozacek v. Kozacek ... 180

L

Lamb ats. City of Chicago. ... 204
Lee ats. Considine. ... 246
Lee County Savings Bank ats. Aleshire. ... 32
Lemker v. Kalberlah. ... 445
Lidberg ats. Hernreich. ... 495
Lincoln Park Chapter R. A. M. v. Swatek. ... 604
Loftus v. Hamilton. ... 72, 75
London Mills, Village of, v. Fairview-London Telephone Circuit. ... 146
Lund ats. Weidner. ... 454

M

Magerstadt v. The People. ... 316
Malstrom ats. Suburban R. R. Co. ... 631
Manitowoc Seating Co. ats. Walkau. ... 130
Manning ats. Van Vlissingen. ... 255

Mark v. Schumann Piano Co..... 490
Marvel v. McKinzey..... 164
Mattoon Gas Light and Coke Co. v. Dolan..... 1
Mauger ats. Chicago City Ry. Co..... 579
McAnaney v. Quigley..... 611
McAyeal v. Gullett..... 155
McCaleb, In re petition of..... 28
McCumber ats. Taylor..... 87
McKinzey ats. Marvel..... 164
McMullen v. Reynolds..... 386
McNulty ats. Illinois Steel Co..... 594
Meister ats. Supreme Lodge Order of Mutual Protection..... 471
Mellhousin ats. Johnson..... 367
Merrill v. Merrill..... 5
Merwin ats. City of Chicago..... 168
Middendorf v. Schulze..... 221
Miller ats. Bank of Commerce..... 224
Miller Signal Co. ats. Davis..... 657
Monarch Book Co. ats. Sprague..... 530
Morrall ats. Ginsburg..... 213
Moses ats. Eickstaedt..... 634
Moulton v. Gibbs..... 104
Munsell v. City of Carthage..... 119
Murphy ats. Baker..... 151
Mutter ats. Supreme Court Independent Order of Foresters..... 518

N

National Mutual Church Ins. Co. v. Trustees M. E. Church..... 143
Needham ats. T., St. L. & W. R. R. Co..... 25
Nichols v. Shaw..... 114
Nisbett ats. Webster Mfg. Co..... 261
Noe v. Witbeck..... 502
North Chicago St. R. R. Co. v. Rodert..... 314
North Chicago St. R. R. Co. v. Wellner..... 652
Northwestern Mutual Ins. Co. v. Churchill.....159, 164
Norton ats. Alton Grain Co..... 385

O

Osborne ats. Chicago City Ry. Co..... 462
Osburn v. City of Chicago..... 217

P

Parmelee v. Price..... 271
Parmly v. Farrar..... 394
Pendergast ats. Stryker..... 418
Penoyer v. The People..... 481
People ats. Magerstadt..... 316
People ats. Penoyer..... 481

People ats. Town of Cicero..... 406
People v. West Chicago St. R. R. Co..... 439
Pittsburgh, C., C. & St. L. Ry. Co. v. Kinnare..... 566
Poehlmann v. Kertz..... 249
Potts ats. Frink..... 92
Prather ats. Gillespie Home Township Mutual Fire Ins. Co..... 123
Price ats. Parmelee..... 271

Q

Quigley ats. McAnaney..... 611

R

Remlee ats. Holdroff..... 671
Reynolds ats. McMullen..... 386
Richardson v. Central Lumber Co..... 358
Robinson ats. Union Book Company..... 236
Rodert ats. North Chicago St. R. R. Co..... 314
Roodhouse, Mayor of, v. Briggs..... 116
Ross ats. B. & O. S. W. R. R. Co..... 54
Rush v. Flood..... 182

S

Salzenstein v. Hettrick..... 99
Schumann Piano Co. ats. Mark..... 490
Schultz ats. Springer..... 544
Schulze ats. Middendorf..... 221
Schwartz ats. Imperial Mfg. Co..... 525
Seitz ats. I. C. R. R. Co..... 89
Shaw ats. Nichols..... 114
Sine ats. Hutchinson..... 638
Smyth v. Stoddard..... 510
Spolek Denni Hlasatel v. Hoffman..... 170
Sprague v. Monarch Book Co..... 530
Springer v. Schultz..... 544
Squair ats. Alston Mfg. Co..... 238
Stensland ats. Supreme Tent K. of M..... 267
Stoddard ats. Smyth..... 510
Story ats. Edwards..... 433
Stryker v. Pendergast..... 413
Suburban R. R. Co. v. Malstrom..... 631
Supreme Court Independent Order of Foresters v. Mutter..... 518
Supreme Lodge Order of Mutual Protection v. Meister..... 471
Supreme Tent K. of M. v. Stensland..... 267
Swank ats. Iles..... 9
Swatek ats. Lincoln Park Chapter R. A. M..... 604

T

Tangany ats. Calhoun..... 23
Taylor v. McCumber..... 87
Terry v. Chicago Packing & Provision Co..... 663

Tobey ats. Henderson..... 154
Toledo, St. L. & W. R. R. Co. v. Needham..... 25
Trustees M. E. Church ats. National Mutual Church Ins. Co..... 143

U

Union Book Company v. Robinson..... 236

V

Vail ats. Knights Templers & Masons Life Indemnity Co..... 331
Van Vlissingen v. Manning..... 255
Varnum ats. Ellsworth..... 487
Verchofsky ats. Friedman..... 414
Vesey ats. City of Chicago..... 191

W

Wabash R. R. Co. v. Billings..... 111
Waite ats. Bank of Montreal..... 373
Walkau v. Manitowoc Seating Co..... 130
Warner ats. Kohn..... 321
Watson v. Fagner..... 53
Weare ats. Board of Trade..... 289
Weber v. Zacharias..... 640
Webster Mfg. Co. v. Nisbett..... 261
Weidner v. Lund..... 454
Weidner v. Zimmer..... 454
Wellner ats. North Chicago St. R. R. Co..... 652
West Chicago St. R. R. Co. ats. People..... 439
Wheaton v. Bartlett..... 326
Wheeler v. Wheeler..... 48
Wheller v. City of Bloomington..... 97
Wightman ats. Assets Realization Co..... 618
Windsor, City of, v. C., C., C. & St. L. Ry. Co..... 46
Witbeck ats. Noe..... 502

Y

Yeager ats. Christopher & Simpson Co..... 126

Z

Zacharias ats. Weber..... 640
Zimmer ats. Weidner..... 454
Zimmerman ats. Dick..... 615

A TABLE OF THE APPELLATE COURT CASES

As reviewed by the Supreme Court, showing the result of such review, whether affirmed, modified, dismissed or reversed, with references to the reports where such cases may be found.

A

Adams v. Burke.....102 Ill. App. 148
Affirmed, 201 Ill. 395.

B

Bachmann v. Boals.....103 Ill. App. 427
Affirmed, 201 Ill. 340.

Baker & Reddick v. Summers.....103 Ill. App. 237
Reversed, 201 Ill. 52.

Bignall Hardware Co. v. Iroquois Furnace Co. 102 Ill. App. 68
Affirmed, 201 Ill. 297.

Boals v. Bachmann.....103 Ill. App. 427
Affirmed, 201 Ill. 340.

Bonney v. King.....103 Ill. App. 601
Affirmed, 201 Ill. 47.

Burke v. Adams.....102 Ill. App. 148
Affirmed, 201 Ill. 395.

Burton v. Janeway.....102 Ill. App. 403
Affirmed, 201 Ill. 78.

C

Cannon v. Provident Sav. Life Society....103 Ill. App. 534
Affirmed, 201 Ill. 260.

Central Lumber Co. v. Kelter.....102 Ill. App. 333
Affirmed, 201 Ill. 503.

Chicago City Ry. Co. v. Loomis.....102 Ill. App. 326
Affirmed, 201 Ill. 118.

Clifford v. Village of Winnetka.....N. R. in Ill. App.
Affirmed, 201 Ill. 475.

Clinton Mutual County Fire Ins. Co. v. Zeigler.....
101 Ill. App. 165
Dismissed, 201 Ill. 371.

Curran v. Houston.....101 Ill. App. 203
Affirmed, 201 Ill. 442.

D

Delac v. Illinois Steel Co.....103 Ill. App. 98
Affirmed, 201 Ill. 150.

F

First National Bank v. Ford.....100 Ill. App. 70
Affirmed, 201 Ill. 120.

First National Bank v. Swain.....100 Ill. App. 31
Affirmed, 201 Ill. 416.

Ford v. First National Bank.....100 Ill. App. 70
Affirmed, 201 Ill. 120.

Fowler v. I. D. & W. Ry. Co.....103 Ill. App. 565
Affirmed, 201 Ill. 152.

H

Hale v. Hale Elevator Co.....98 Ill. App. 430
Affirmed, 201 Ill. 131.

Hale Elevator Co. v. Hale.....98 Ill. App. 430
Affirmed, 201 Ill. 131.

Hood v. Malott.....99 Ill. App. 360
Affirmed, 201 Ill. 202.

Houston v. Curran.....101 Ill. App. 203
Affirmed, 201 Ill. 442.

I

Illinois State Reformatory v. Marshall....103 Ill. App. 65
Affirmed, 201 Ill. 9.

Illinois Steel Co. v. Delac.....103 Ill. App. 98
Affirmed, 201 Ill. 150.

Indiana, D. & W. Ry. Co. v. Fowler....103 Ill. App. 565
Affirmed, 201 Ill. 152.

Iroquois Furnace Co. v. Bignall Hardware Co.....
102 Ill. App. 68
Affirmed, 201 Ill. 297.

J

Janeway v. Burton.....102 Ill. App. 403
Affirmed, 201 Ill. 78.

Jocelyn v. White.....98 Ill. App. 50
Affirmed, 201 Ill. 16.

K

Kelter v. Central Lumber Co.....102 Ill. App. 333
Affirmed, 201 Ill. 503.

King v. Bonney.....103 Ill. 601
Affirmed, 201 Ill. 47.

L

Loomis v. Chicago City Ry. Co.....102 Ill. App. 326
Affirmed, 201 Ill. 118.

M

Malott v. Hood.....99 Ill. App. 360
Affirmed, 201 Ill. 202.

Marshall v. Illinois State Reformatory....103 Ill. App. 65
Affirmed, 201 Ill. 9.

Mason v. Uedelhofen.....102 Ill. App. 116
Affirmed, 201 Ill. 465.

Massey v. The People.....103 Ill. App. 397
Affirmed, 201 Ill. 409.

McCormick v. People.....104 Ill. App. 650
Affirmed, 201 Ill. 310.

Miller v. Pearce.....99 Ill. App. 424
Affirmed, 201 Ill. 188.

P

Pearce v. Miller.....99 Ill. App. 424
Affirmed, 201 Ill. 188.

People v. McCormick.....104 Ill. App. 650
Affirmed, 201 Ill. 310.

People v. Massey.....103 Ill. App. 397
Affirmed, 201 Ill. 409.

Provident Sav. Life Society v. Cannon...103 Ill. App. 534
Affirmed, 201 Ill. 260.

R

Robinson v. Sharp.....103 Ill. App. 239
Reversed, 201 Ill. 86.

S

Sharp v. Robinson.....103 Ill. App. 239
Affirmed, 201 Ill. 86.

Summers v. Baker & Reddick.....103 Ill. App. 237
Reversed, 201 Ill. 52.

Swain v. First National Bank..... 100 Ill. App. 31
Affirmed, 201 Ill. 416.

T

True & True Co. v. Woda.....104 Ill. App. 15
Affirmed, 201 Ill. 315.

U

Uedelhofen v. Mason.....102 Ill. App. 116
Affirmed, 201 Ill. 465.

W

White v. Jocelyn.....98 Ill. App. 50
Affirmed, 201 Ill. 16.

Winnetka, Village of, v. Clifford.....N. R. in Ill. App.
Affirmed, 201 Ill. 475.

Woda v. True & True Co.....104 Ill. App. 15
Affirmed, 201 Ill. 315.

Z

Zeigler v. Clinton Mutual County Fire Ins. Co.....
101 Ill. App. 165
Dismissed, 201 Ill. 371.

CASES

IN THE

APPELLATE COURTS OF ILLINOIS.

THIRD DISTRICT—MAY TERM, 1902.

105 1
s111 334

Mattoon Gas Light and Coke Co. v. Catherine Dolan.

1. ACTIONS—*Given to Personal Representative of Deceased for Death by Negligent Act.*—By the common law no right of action was given to the personal representatives of a deceased person whose death was caused by the wrongful act, neglect or default of another; such action is secured only by the statute (chapter 70, R. S.); the amount recovered shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate.

2. STATUTES—*Chapter 70, R. S., Construed.*—The term "administrator" as used in chapter 70, R. S., is construed to mean personal representative.

3. RELEASE—*Of Claim by Sole Beneficiary.*—The right of the sole beneficiary of a suit, who is under no disability, to settle and accept payment of the unliquidated damages due her, is well settled.

4. ADMINISTRATOR—*Right and Authority to Control and Settle Suit.*—The right and the authority of the administrator, who is only the representative of the beneficiary, to control the suit or settle it, is by no means exclusive. The principal may also do what the agent may; the beneficiary, if under no disability, or limitation, may do what the trustee may. The administrator can only sue for, recover and distribute the damages.

5. PRACTICE—*What Evidence is Admissible in Actions Ex Delicto Under the General Issue.*—In actions *ex delicto*, all evidence tending to show that there is no cause of action, may be given under the general issue, and this includes a release.

Trespass on the Case, for personal injuries. Appeal from the City Court of Mattoon, the Hon. LAPSLEY C. HENLY, Judge presiding. Heard in this court at the May term, 1902. Reversed and remanded. Opinion filed November 1, 1902.

ALEXANDER CLARK, attorney for appellant.

JOHN F. VOIGT, JR., and ANDREWS & VAUSE, attorneys for appellee.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

This suit was before us at a former time (96 Ill. App. 652), and the judgment in favor of Dolan was then reversed for errors of instructions. Pending the suit Timothy Dolan died, and appellee having been appointed administratrix, she was substituted as the plaintiff in the case, and the declaration was amended, charging that Dolan died of the injuries received in consequence of the wrongful act, neglect or default of appellant, and that he left a widow and next of kin. A trial by jury ended in a verdict against appellant for $1,000, of which appellee entered a remittitur of one dollar, and the court, after overruling appellee's motion for a new trial, gave judgment against it for $999, to reverse which this appeal is prosecuted and various alleged errors have been urged upon our attention to effect such reversal, among which are that the court rejected proper evidence offered by the appellant, gave to the jury improper instructions, refused proper instructions, and the verdict is unsupported by the evidence.

The evidence in the case shows that the deceased left a widow, and no children surviving him. By the common law no right of action was given to the personal representatives of a deceased person whose death was caused by the wrongful act, neglect or default of another, and such action is secured only by the statute, (chapter 70, Rev. St.,) and the amount recovered shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate. The law in relation to such distribution, where there is a widow, and no child or children, or descendants of a child or children of the intestate, is that the whole of the personal estate

shall descend to such widow as an absolute estate. (Par. 3, section 1, chapter 39 Rev. St.) It has been settled by frequent decisions that the action provided for by the statute is to be in the name of the administrator, that being construed to be the meaning of personal representatives, the term used in the statute; but, as the statute declares, the action is for the exclusive benefit of the widow and next of kin of the deceased person, which by reference to the statute of descents, as has been seen, means in this case, the benefit of the widow alone, as distribution of the amount recovered could only be made to her. After the death of Dolan, this suit could only be prosecuted for the exclusive benefit of his widow. None of his next of kin had an interest in it, and nothing could be recovered on their account. The right to damages is limited to the pecuniary injury to his widow, resulting from the death of the husband. Appellant offered in evidence an instrument of writing, proved to have been executed by the widow, by which she acknowledged the receipt of $200, paid to her by the appellant, in consideration of which she thereby released appellant from the cause of action incident upon her husband's death. The court sustained appellee's objection to the introduction of the paper, and rejected it as evidence in the case. In support of the ruling of the court, we have been cited to Henchey v. Chicago, 41 Ill. 136, and Perry v. Carmichael, 95 Ill. 530. The first of those cases merely decides that the administrator has control of the suit, and could settle and dismiss it, if such conduct was in good faith, and could be brought to account by the beneficiaries for improperly doing so, but the settlement would be conclusive between herself and the defendant. The second case referred to, merely holds that money paid to one who has no authority to receive it, in settlement of the claim of others, is held in trust for the beneficiaries. These cases, we think, prescribed elementary principles that need no argument to support them; but their application to the point in question is not seen. The right of the sole beneficiary of a suit, who is under no disability, to settle and

accept payment of the unliquidated damages due her, it seems to us is too plain and simple to need argument or authority in its support. In Maney v. C. B. & Q. R. R. Co., 49 Ill. App. 105, it was said that the acceptance of a sum in compensation of loss by reason of the death of another, the parties having the relation described in the statute, might operate as a bar of further recovery, by way of estoppel. The right and authority of the administrator, who is only the representative of the beneficiary, to control the suit or settle it, is by no means exclusive. The principal may also do what the agent may. The beneficiary, if under no disability or limitation, may do what the trustee could do. The administrator could only sue for, recover and distribute the damages. The only distributee in this case is the widow of the deceased, and it would be anomalous to say that she could in this form receive two-fold compensation for a pecuniary loss. The only reason for the suit was the failure of the meeting of minds of the parties interested in agreement relative to the liability for, and the amount of the loss; and this being accomplished, there was no longer any requirement for the prosecution of this suit. The suit having been prosecuted rightfully in her representative capacity, and the compromise having been effected afterward, she was at least entitled to nominal damages, and a judgment for costs. It has been suggested that appellee had a lien upon the damages for her expenses. The decision in Henchey v. Chicago, *supra*, holds there is no lien where the damages are unliquidated. It is also further intimated, the release was obtained by fraud. The answer to this is there was no evidence of it, and if there was, that would be a question for the jury to determine. It is also the familiar practice, in actions *ex delicto*, that all evidence tending to show there is no cause of action, may be given under the general issue; and this rule includes a release, such as was offered in evidence in the case, and we are of the opinion it was prejudicial error for the court, as it did, to reject it.

The court instructed the jury to the effect that if

plaintiff was entitled to recover under the evidence, then the jury should assess the damages at such sum as they might believe from the evidence to be just compensation with reference to the pecuniary injury resulting to the wife and next of kin. This instruction, as we have seen, is wrong; the damages should be confined to the wife alone.

It follows from what we have said that upon the admission of the release in evidence it would be proper for the court to instruct the jury upon it; but an instruction of that kind was refused by the court, of which appellant complains. As the evidence was, the instruction was properly refused, for the reason the court had rejected the evidence upon which it was based.

Further complaints have been made and argued with reference to the evidence of the case, and the instructions of the court; but what we have already said we think sufficiently covers all that is material for a proper disposition of the case.

For the errors indicated the judgment of the trial court will be reversed, and the cause remanded for further proceedings in consonance with the views herein expressed.

Reversed and remanded.

John W. Merrill et al. v. Clifford D. Merrill.

1. INSTRUCTIONS—*Signaling Out One Prominent Fact and Ignoring Others.*—An instruction which calls repeated attention to a prominent fact upon which fraud is predicated—the relationship of the parties, and ignores another important point incident to such relation, is misleading.

2. SAME—*That No Presumption Arises from Relationship of Parties to Alleged Fraudulent Sales.*—An instruction which tells the jury that there is no presumption of law from the relationship of the parties to an alleged fraudulent sale, is misleading, when, if considered together with other facts proven in the case, not alluded to in the instructions, the circumstances of the relationship of the parties might have been of controlling importance.

3. SAME—*That the Father and Son, in Their Dealings with Each*

Other, Are upon Precisely the Same Footing as Persons Who Are Strangers.—An instruction that the father and son, in their dealings with each other, are precisely upon the same footing as persons who are strangers, and that the same presumptions of honesty and fair dealing applies to them as to other persons, is erroneous. This is a question of fact for the jury.

Trespass, for taking and selling a stock of goods upon an execution. Appeal from the Circuit Court of Ford County; the Hon. JOHN H. MOFFETT, Judge presiding. Heard in this court at the May term, 1902. Reversed and remanded. Opinion filed November 1, 1902.

HENRY W. WOLSELEY, attorney for appellants.

TENNEY, MCCONNELL, COFFEEN & HARDING and O. H. WYLIE, attorneys for appellee.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

This was an action of trespass against appellant Merrill, together with Timothy Ross, sheriff of Ford county, for taking and selling a stock of goods upon an execution against Louis Merrill. The recovery was for $4,604.08, and to reverse the judgment this appeal is brought. Louis Merrill, the father of appellee, kept a general store at Cabery, in Ford county, and was largely indebted to his brother, John W. Merrill, and to other persons, greatly in excess of his apparent assets. He sold his stock of goods to his son, the appellee, for $4,000, and in payment took his four notes of $1,000 each, due in one, two, three and four years respectively. Appellee took possession of the property and proceeded to conduct the business of the general store, and did for a time, until, upon learning of the sale, appellant Merrill took judgment upon his notes against Louis Merrill, levied upon and sold the stock of goods as the property of Louis Merrill, insisting the sale to the son, appellee, was fraudulent, and designed to hinder and delay the creditors of the father, and this was the chief issue of fact in the trial court.

Appellee knew of some of his father's debts, and from all the circumstances, and his association with the father, it is a fair inference that he knew his father was greatly involved

in debts that he was unable to pay, and this, coupled with the giving of the notes as stated, operated, it is insisted, as a fraud upon the father's creditors—if not in fact, at least in law. The sale as it was made, hindered the creditors of the father, and put the proceeds of the sale out of their reach, and, whether fraudulent or not, that at least was a question requiring accuracy of instructions to the jury in order that they might not be misled in the determination of the vital issue of the case. Among others, the court gave the following instructions at the instance of the plaintiff:

"3. The law presumes that men act and intend to act, in their business dealings, fairly and honestly, and without any intention of defrauding others; and therefore, one who charges that a transaction has been entered into with fraudulent or corrupt motives must establish his charge by a preponderance of the evidence.

4. The law does not forbid relatives from dealing with each other, but on the contrary they have the same right to buy from and sell to each other as other persons have, and a sale can not be held to be fraudulent merely because it was made from a father to a son, or between other relatives; and the same presumption of honesty and fair dealing applies to such a sale as to transactions between other persons, until it is overcome by a preponderance of evidence tending to show that a fraud was intended or committed.

5. The fact that Clifford Merrill is the son of Louis Merrill, from whom he purchased the goods in controversy, of itself, does not show that the sale was a fraudulent one, nor of itself raise any presumption against either the good faith of the parties or the validity of the sale. And before the sale can be impeached there must be other evidence from which, in connection with all the facts and circumstances in the case, you believe that the purpose of the sale was to hinder, delay or defraud creditors."

By these instructions the court repeatedly impressed upon the minds of the jury, as the law applicable to this case, that the law presumes that men act and intend to act honestly, without intent to defraud, and this presumption of honesty applies to the sale from the father to the son in this case, and that the relationship of the parties does not raise any presumption against the good faith of the parties

or the validity of the sale. These instructions, as applied to the vital issue in this case, are misleading; if for no other reason, because they call repeated attention to a prominent fact upon which fraud is predicated—the relationship of the parties, and ignore another important point incident to such relation, which, it was insisted, appeared on the trial—the knowledge of the son of the father's embarrassed circumstances, and that the sure effect of giving notes on time, as they were, would remove all the father's assets beyond the reach of his creditors. Whether the sale was entered into at the time with fraudulent or corrupt motives, as for the purpose of hindering and delaying the creditors of the father, was a fact to be determined by the jury from all the evidence in the case, including the relationship of the parties and all its surrounding circumstances, and it was misleading and prejudicial for the court to call the attention of the jury repeatedly, as it did, to the single fact of relationship, and say, as a matter of law, that no presumption arises from that fact, when, if considered together with other facts proven in the case, not alluded to in the instructions, the circumstance of the relationship of the parties might have been of controlling importance. The instructions also put the father and son, in their dealings with each other, precisely upon the same footing as persons who are strangers, when the jury are told that the same presumptions of honesty and fair dealings applies to them as to other persons. This was a question of fact, also, for the jury to decide from all the evidence in the case. It has been said in Second National Bank v. Gilbert, 174 Ill. 485, that where the parties to a transfer are near relations, clearer and more convincing proof is required of the good faith of the transaction, than when they are strangers. In Martin v. Duncan, 156 Ill. 280, an instruction was asked to the effect, that while it is not unlawful for brothers to deal with each other, yet where the parties to a transfer are near relatives, clearer and more convincing proof is required of the good faith of the transaction, than when they are strangers; and it was said there was no good

reason why the instruction should not have been given. If such an instruction is proper, as the Supreme Court say it is, it follows that those given in this case in opposition to its principle, are erroneous. It is, however, sufficient for us to say, that in our opinion the question whether the relationship of the parties, together with all the other evidence, was sufficient proof of fraud, was for the jury to decide, and that it was error to recite in the instructions, as was done, the single fact of such relationship, disconnected from the other facts, and say that no presumption arose from it. If such fact was duly considered by the jury, and given its proper weight in view of the other facts proved, that alone might have turned the scale and brought the verdict differently, while, as we think, the instruction led the jury to consider the relationship of the parties as an isolated fact merely. In view of the unsatisfactory state of the evidence to support the verdict, we believe the jury was misled by the instructions.

For the reasons we have given, the judgment of the Circuit Court will be reversed and the cause remanded for a new trial.

Wesley Iles v. Emma L. Swank.

105 9
a202s 453

1. SLANDER—*What is, Under the Statute.*—The statute makes it an actionable slander for a person to falsely use, utter or publish words which in their common acceptance shall amount to charge any person with having been guilty of fornication or adultery.

2. SAME—*When Several Statements Taken Together Amount to Charging Plaintiff with Adultery.*—While it is true that it is not slander to say falsely of a person that he or she *would commit an offense*, which would constitute slander if it had been said that such person had committed that offense, yet where several such statements, in view of the whole connection, surroundings, occasion and evident intent with which they were spoken and understood by the persons to whom they were said, amount to charging the plaintiff with having been guilty of adultery, such statements constitute slander.

Trespass on the Case, for slander. Appeal from the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge presiding.

Heard in this court at the May term, 1902. Affirmed. Opinion filed November 1, 1902.

G. W. SALMANS and FRED DRAPER, attorneys for appellant.

PENWELL & LINDLEY, attorneys for appellee.

MR. JUSTICE BURROUGHS delivered the opinion of the court.

This was an action on the case brought in the Circuit Court of Vermilion County June 6, 1901, by the appellee, Emma L. Swank, against the appellant, Wesley Iles, to recover damages for slander alleged to have been spoken of her by him. The case was tried by jury and resulted in a verdict in favor of appellee for $1,500. The appellant moved for a new trial, which being denied, he excepted, and the court gave judgment on the verdict.

To effect a reversal of the judgment the appellant prosecutes this appeal and argues for error that the verdict and judgment are against the law and evidence, and that the court gave an improper instruction for the appellee and refused proper instructions for the appellant.

The declaration, after alleging that the appellee was a chaste and virtuous married woman, living upon a farm with her husband and enjoying a good name and reputation, charged that the appellant, maliciously intending to injure her in her good name and reputation, and bring her in public scandal and disgrace, and to cause her to be suspected and believed by others to be a lewd and unchaste woman and guilty of adultery, in a certain conversation which he had on, to wit, June 7, 1900, with one W. R. Wright (who was then boarding at the house of her husband and working for him on the farm), falsely charged the appellee with having been guilty of adultery by asking said Wright "If he was getting much" (meaning to inquire if the said Wright was having sexual intercourse with any one). And that said Wright replied, "he was not." That the appellant then said to Wright, "It seems as though you are. How about that woman up there"? (Meaning the appellee). Wright asked the appellant what woman he

meant; the appellant replied, "Mrs. Swank, up there where you stay." Wright replied that "she was a nice woman as far as he knew and never thought of anything of that kind" (meaning sexual intercourse with said Wright). The appellant replied to said Wright, "You ought to get it" (meaning sexual intercourse with the appellee); "that he (meaning appellant) could get it" (meaning that the appellant could have sexual intercourse with the appellee); "that he knew her to be that kind of a woman" (meaning that the appellee was a lewd and unchaste woman and had been guilty of adultery).

And in another count the appellant was charged with falsely saying at another time on, to wit, June 7, 1900, that "She (meaning the appellee) keeps a public house; I could do business with her if I wanted to. I have seen lots of that going on there." (Meaning thereby to charge the appellee with having been guilty of adultery.)

And in a further count, the appellant was charged with having falsely said, on, to wit, June 7, 1900, to another farm hand who lived on the farm with the appellee and her husband, "How about that woman up there?" (Meaning the appellee.) "Mrs. Swank, up there where you stay. You ought to get it." (Meaning sexual intercourse with the appellee.) "I can get it (meaning that the appellant could have sexual intercourse with the appellee if he desired.) "She is that kind of a woman." (Meaning thereby that the appellee was a lewd and unchaste woman and was guilty of adultery.)

The appellant demurred to the declaration, but it was overruled and he pleaded, first, the general issue, and second, the statute of limitations, and issue was joined on the first, and the second was traversed.

The evidence shows that the appellee is a married woman living on a farm with her husband, who employed and boarded J. D. Wilfrong and W. R. Wright. J. D. Wilfrong testified that while he was living with them (about June, 1900,) the appellant inquired of him how he liked working for the appellee and her husband. That he answered

"All right." That the appellant then said, "I know why; they run nothing but a public house and I could do business with the woman if I wanted to." That the witness understood that the appellant meant by what he said, that appellee and her husband ran a bad house; that the appellant could have sexual intercourse with her if he desired, and that she had and would commit adultery.

W. R. Wright testified that while he was living with the appellee and her husband in June, 1900, he had occasion to go past where the appellant lives, and as he passed, the appellant talked with him about the appellee, and asked him if he was getting much these days, and he said "No, I don't know as I am;" and he said "Seems as if you are;" and I said "From whom?" and he said "From that woman up there;" and I asked "What woman?" and he said "Swank's wife;" and I said "No, I didn't think she was that kind of a woman;" and he said "If you ain't you ought to, you can get it, and you are a fool if you don't; I could do business with her." The witness further testified that "from the way the appellant spoke it, and in the tone he spoke it, he was trying to make Mrs. Swank a bad character; that she was nothing but a whore."

There were some persons who testified that the general reputation of the witnesses J. D. Wilfrong and W. R. Wright in the neighborhood where they lived, for truth, was not very good, while others testified that such reputation was good.

The appellant owns seventy acres of land worth $90 per acre, is a bachelor, and owns personal property worth several hundred dollars. The appellee and her husband own a house and lot in Sidell worth about $400, and he is a tenant farmer.

The appellant testified in his own behalf and denied that he had said either what J. D. Wilfrong testified he said about the appellee, or what W. R. Wright testified that he said concerning her.

The court gave but a single instruction for the appellee, while six were given at the instance of the appellant, and

when they are all read as one charge, they fairly and fully embody the law applicable to the averments of the declaration and the evidence on the trial.

Counsel for appellant criticises the instruction given for the appellee for assuming that some of the counts in the declaration charge actionable slander, and it is contended that none of them do, or if any do, that the instruction fails to state which do and which do not.

There was a demurrer filed to the declaration and overruled, and had counsel for the appellant desired to have taken the judgment of this court on the sufficiency of the declaration, they should have stood by their demurrer and not have pleaded to the declaration and submitted instructions which imply that it stated a good cause of action as respects the counts upon which the case was tried.

We have examined the instruction criticised, however, and while it is loosely and inartfully drawn, yet in substance it embodies a correct proposition of law applicable to the issues tried and the evidence produced, and therefore it was properly given.

The principal contention of the appellant, however, is that the words alleged to have been spoken by him, and which the two witnesses testified he used, do not charge that the appellee had committed adultery, but would do so if properly approached, and that does not constitute slander.

While it is true that it is not slander to say falsely of a person that he or she *would commit an offense*, which would constitute slander if it had been said that such person had committed that offense (Koch v. Heideman, 16 Ill. App. 478), yet we are not prepared to hold that each of the three sets of words alleged in the three counts of the declaration above quoted respectively to have been falsely spoken by the appellant of and concerning the appellee, a married woman, do not, in their common acceptance, amount to charging her with having been guilty of adultery, for we think they do; especially in view of the whole connection, surroundings, occasion and evident intent with which they were spoken and understood by the persons to whom they

were said; the statute makes it an actionable slander for a person to falsely use, utter or publish words which in their common acceptance shall amount to charge any person with having been guilty of fornication or adultery. (1 S. & C. Ill. Stat., Chap. 126, Sec. 1.)

In the conflict of the evidence, it was the peculiar province of the jury to determine where the truth was, and the bill of exceptions does not contain anything that warrants us in disturbing their conclusion, and therefore we will affirm the judgment.

The Chicago and Alton R. R. Co. v. Nannie Flaherty.

105 14
a202s 151

1. PRACTICE—*Where Case Has Been Tried Twice by a Jury.*—Where a case has been tried twice by a jury, and their conclusion twice approved by the trial judge, it will not be disturbed, in the absence of anything appearing in the record which tended to improperly influence them in the consideration and determination of the issues presented to them.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Macoupin County; the Hon. ROBERT B. SHIRLEY, Judge presiding. Heard in this court at the May term, 1902. Affirmed. Opinion filed November 1, 1902.

PATTON, HAMILTON & PATTON, attorneys for appellant; WILLIAM BROWN, of counsel.

DAVID E. KEEFE and PEEBLES & PEEBLES, attorneys for appellee.

OPINION PER CURIAM.

When this case was before us at a former term, a judgment against the railroad company in favor of Miss Nannie Flaherty for $3,000 was reversed because the court gave improper and refused proper instructions, and the case was remanded to the Circuit Court for another trial. A statement of the case appears in 96 Ill. App. 563, and it is unnecessary to repeat it. It was tried by jury again, and

resulted in verdict and judgment in her favor for the same amount as before.

The railroad company appeals to this court to reverse the latter judgment and argues for error that the court admitted improper evidence; that the evidence is insufficient to support the verdict, and that the damages are excessive.

The testimony which it is now claimed was improper, was held to be proper when the case was formerly before us, and the record does not show anything which rendered it improper.

The evidence upon the second trial was substantially the same as before, and it also appears that appellee is still unable to use her left leg, the ankle and foot of which were injured. There is nothing in the evidence which now causes us to change our former conclusion that the case should be passed upon by a jury, and the conclusion they reached upon the facts having been twice approved by the trial judge, will not be disturbed, in the absence of anything appearing in the record which tended to improperly influence them in the consideration and determination of the issues presented to them.

It is contended that the damages awarded are excessive because the bad condition of appellee's leg, foot and ankle are due largely to her failure to use them, and because she has kept it too tightly bandaged since she received the injuries of which she complains.

The appellee testified that she had attempted to use them several times since she was injured and such attempts gave her great pain; that for want of proper strength in her ankle, it would bend inwardly so that she could not put any of her weight upon that leg and that the bandage was used in the manner directed by her attending physician, who testified that the bandage was properly used. And while other physicians testified at the instance of the railroad company that the continued bad condition of appellee's leg, ankle and foot was largely due to her not using them in spite of the pain attending such use, and to the tight

bandage she wore, yet we are convinced that the injuries which appellee received, the pain she suffered, and her total inability to use her leg, warranted the jury in allowing her the amount they did.

No prejudicial error having been committed against the appellant, the judgment is affirmed.

The Chicago & Alton R. R. Co. v. Truman K. Gore.

105 16
a202s 188

1. CARRIER OF PASSENGERS—*Care to be Exercised for the Protection of Persons Alighting and Boarding Trains at Stations.*—Managers and conductors of railroad trains must take notice that passengers and employes, while trains are yet at station platforms, do and will, sometimes, get upon them when in slow motion, and as a high degree of care is due for the protection of persons alighting from and boarding trains at stations, it is the duty of the management of railroads to see to it that the platforms at the stations are unobstructed by trucks, baggage, or otherwise within a safe distance from the side of the train, before leaving the station.

2. PRACTICE—*Object of Arguments to Juries.*—The object of argument to juries by counsel, is to induce the proper conclusions by which verdicts may be reached, based upon the evidence of the case, and counsel may from the evidence in the case, draw conclusions, upon their own system of reasoning, as to what the general verdict should be; and inasmuch as the special verdicts are to affect the general verdict, counsel may advise the jury, in their argument, concerning such findings.

3. SAME—*Motion in Arrest of Judgment When There is One Good Count.*—Where there is one good count in the declaration, a motion in arrest of judgment can not prevail.

4. NEGLIGENCE—*A Question for the Jury.*—It is for the jury and not for the court to say what constitutes negligence.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Macoupin County; the Hon. ROBERT B. SHIRLEY, Judge presiding. Heard in this court at the May term, 1902. Affirmed. Opinion filed November 1, 1902.

PATTON, HAMILTON & PATTON, attorneys for appellant; WILLIAM BROWN, of counsel.

BELL & BURTON, attorneys for appellee.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

This case was before us twice before, 92 Ill. App. 418, and 96 Ill. App. 553, and at those times the judgments were reversed, and the cause remanded for a new trial, for reasons stated in the opinion of the court. A third trial has resulted in a verdict against the appellant for $5,304, upon which the court, after having overruled appellant's motion for a new trial, gave judgment, and appellant again brings the record to this court for review, and to effect a reversal of the judgment has assigned and argued various errors which it is insisted contain a sufficient vice for such purpose.

As to the facts of the case, there is no substantial difference than when the case was before us at the former times, and we refer to our former opinions for a statement of the case without repetition here. It is in the first place insisted that the trial court should have directed a verdict for the defendant, as it requested, because the plaintiff was guilty of contributory negligence. That the act of appellee in attempting to board a moving train, under the circumstances shown by the evidence, is contributory negligence, and therefore a bar to a recovery. When the case was before us the last time we said:

"What is or is not negligence is a question of fact to be decided by a jury, under proper instructions, unless the act sought to be established as constituting contributory negligence is such that all fair and reasonable minds would agree that it should be so characterized. It may be that, as a question of fact, circumstances may exist when to board a moving train would not be negligence; for other independent forces may intervene, set in motion by causes not connected with the moving train, unforeseen by the person injured, and in the absence of which there might, in the exercise of ordinary care, be entire safety. The question is always whether the act is one which is consistent with prudence under the circumstances. And again, we can imagine circumstances when no fair or reasonable mind but would say it was negligence to board a moving train. It is of course impossible to lay down a fixed rule upon the sub-

ject, and it is not intended to do so, for the question is one of fact and not of law; but in the view we have of the present case we think, under proper evidence as to the incidents of the accident, and proper instructions, the jury may be permitted to say whether the act of boarding the moving train was or was not contributory negligence on the part of the appellee. If it was, the law is he can not recover. If it was not, and the evidence then shows the injury was the result of the negligence charged against, and committed by the defendant, then such recovery might be sustained."

So it may be seen, from what we have quoted from our former opinion, that this court is committed to the statement that the facts and circumstances in this case were such that it was proper to submit the question, whether or not it was contributory negligence to board the moving train, to the jury, and we are still satisfied we then reached the correct conclusion upon this point, and we are now to consider whether the jury were warranted in finding, as they did, that there was no contributory negligence, and that the injury to appellee was the result of the negligence charged against and committed by the appellant. The conductor of the train knew that appellee was a passenger, and that he was upon the platform at the station desiring and intending to get upon the train. It was the duty of the conductor to give, and we think from the evidence that he did give appellee a reasonable opportunity to board the train. While in the act of boarding the train, however, it started to move, which no doubt to some extent confused the mind of appellee as to surrounding conditions, and in such confusion of mind appellee was compelled to instantly decide whether it was safer to persist in his effort to get upon the train, or get upon the platform, and by the impulses that would naturally spring from the ordinary mind under like circumstances, he clung with his hand gripping the guard rail, and in this, we think, he did no more than ordinary men would do under like circumstances. In truth, the train was moving very slowly, and was yet to be boarded by the conductor himself, and it is not to be presumed that he considered it dangerous to get upon the train while it was moving slowly like it was at that time. There

was in fact no danger apparent to the ordinary mind in the mere act of stepping upon the train when appellee did so, and but for another fortuitous circumstance, the position of the baggage truck upon the platform, no injury would have happened to him. Managers and conductors of railroad trains must take notice that passengers and employes, while trains are yet at station platforms, do and will, sometimes, get upon them when in slow motion, and as a high degree of care is due for the protection of persons alighting and boarding trains at stations, it is the duty of the management of railroads to see to it that the platforms at the stations are unobstructed by trucks, baggage, or otherwise, within a safe distance from the side of the train, before leaving the station. Had such a precaution as this been taken, demanded as we think by a high degree of care, appellee would not have been injured. The declaration charges this obstruction to the platform as one of the elements of the negligence averred against appellant, and we have little doubt, in view of all the evidence, the negligence leaving the truck so dangerously near the train was the proximate cause of the injury to appellee, and had it not been there, no injury would have happened. It follows, therefore, from what we have said, that in our opinion the jury was warranted in finding, as they did, that appellee was in the exercise of ordinary care and that appellant was guilty of the negligence charged in the declaration, and that the latter was the proximate cause of the injury to appellee. The court did not err in refusing to direct the verdict at appellant's instance, nor will the verdict be disturbed on the ground it is not supported by the evidence.

It is also insisted that the admission by the court in evidence of the conversation between the appellee and the conductor relative to appellee's intention to alight from the train at Joliet to change the destination of his baggage, was erroneous and prejudicial. We held, in our former opinion, this evidence properly admissible, for the purpose of showing that appellee was a passenger; and we might also have added, for the purpose of further showing that the

conductor knew it was appellee's intention to get off the train at this point for the purpose of re-checking his baggage; and we are still satisfied with our holding upon that point—in truth, bound by it in the present case. The conductor knew that appellee was a passenger; he also knew from the conversation admitted in evidence that it was appellee's intention to alight from the train at that station. There is no evidence that appellee was forbidden to so alight, and when he did so with the knowledge and assent of the conductor, as he did, appellant then owed him the same duty, and none other, while upon the platform, that it owed to others whom it knew were about to enter the train originally to take passage, and, as we said before, we are not prepared to say the conductor did not perform his full duty in this respect, the fault of appellant being that of leaving a baggage truck dangerously near the train, in consequence of which appellee was caught by it, thrown, and thus injured.

There was no prejudicial error in the court's modification of the special interrogatories by the insertion of the word "proximate" before the word "cause," so that the jury was required to say whether the attempt to board the train while in motion was the proximate cause, instead of the cause of the injury. In the relation of these words to the general verdict, as they were used in the interrogatories, we see no substantial difference in their meaning. It would doubtless have been proper to have given them as requested, but there was no prejudicial error in their modification.

It is also argued that the trial court erred in permitting the counsel for appellee to discuss, in their argument to the jury, what the proper answers, upon the evidence in the case, should be to the special interrogatories, and Elgin City Ry. Co. v. Wilson, 56 Ill. App. 364, is cited in support of the argument. We do not find that case in point, as the court there only denounced the statement of counsel that the law relating to special findings was procured from the legislature by the efforts of corporations; the remarks of counsel concerning the special findings, required of the jury, were not given in the record then before the court, and

the question was therefore not before it. We know, and this is the knowledge of the profession everywhere, that the object of arguments to juries by counsel is to induce the proper conclusions by which verdicts may be reached, based upon the evidence of the case; and it has never been questioned, so far as we are advised, that counsel may from the evidence in the case draw conclusions, upon their own system of reasoning, as to what the general verdict should be; and inasmuch as the special verdicts are to affect the general verdict, we are unable to devise any good reason why counsel should be prohibited from advising the jury, in their argument, concerning such findings. If the legislature, in providing that such questions of fact shall be submitted to the adverse party before the commencement of the argument to the jury, did not intend to afford counsel an opportunity to argue the same questions to the jury, then we are at a loss to know what was intended. In the absence of binding authority to the contrary, and none has been cited, and we are aware of none, we are of the opinion that counsel on both sides have the right, within the evidence of the case, to discuss, in their argument to the jury, all questions arising upon such evidence, and there should be no limitation upon the argument merely because one side or the other may request special verdicts, including some or all of the questions; and this may be done, even to the extent of advising the jury how, in the opinion of counsel, the special questions should be answered from the evidence in the case. The same points would be in the case without the request of a special finding, upon which counsel would undoubtedly be entitled to be heard before the jury, and it seems absurd to hold that because one side has requested a special verdict the other must be silent upon the subject of such verdict; for, if this was carried to its logical sequence, it would be possible to prevent all argument to the jury by ingeniously requesting special verdicts upon all the material points in the case.

We have examined the instructions given for the plaintiff below, in the light of the criticisms put upon them by counsel for appellant, and find no prejudicial error in them;

and when all the instructions are considered together, given by the court for either party, we are of the opinion the jury was as fully and fairly instructed as the rights of appellant demanded, and all that was proper in the refused instructions was contained in those given by the court at the instance of appellant. The eleventh refused instruction, of which complaint is made, assumes to tell the jury that certain facts recited in it, if true, would prevent a recovery, and it was properly refused because it was for the jury, and not for the court to say what constituted negligence. The tenth instruction is too broad in directing the jury to disregard evidence that was admitted, and that we held in a former opinion was properly admissible. Had the instruction been so framed as to direct the jury to disregard the evidence so far as it affected the negligence charged in the declaration, it would have been proper to have given it; but there was no error in refusing it as asked. The jury having found that the attempt to board the train by appellee while it was in motion was not the cause of the injury, rendered the refusal of the twelfth refused instruction harmless. The sixteenth, seventeenth and twentieth instructions assume to tell the jury what is negligence, and were properly refused; and the eighteenth and nineteenth instructions were properly refused for the reasons we have specified in respect to the tenth.

The motion in arrest of judgment was properly denied. While all of the negligent acts imputed to appellant, and averred in the second count of the declaration, were not proved, and need not have been, still it contained enough substantive and independent averments, relative to the obstruction upon the platform in its relation to the operation of the train, whereby appellee was caused to be struck by such obstruction and thereby injured; and this we think stated a good cause of action for negligence and made the count good, at least after verdict, and where there is one good count in the declaration, a motion in arrest of judgment can not prevail. Finding no reversible error in the record and proceedings of the Circuit Court, its judgment will be affirmed.

Hannah Calhoun v. Patrick Tangany et al.

1. ADMINISTRATION OF ESTATES—*Beneficiaries Should Contribute to the Payment of Debts of the Estate Pro Rata.*—Beneficiaries should be required to pay the liabilities against the estate *pro rata* according to the respective shares inherited by them. A judgment against them in assumpsit is not proper, as it would necessarily be the same against all, and by force of it any one of the defendants could be required to pay the whole of it and again be compelled to sue the co-defendants for contribution, thus perpetuating the litigation.

Assumpsit.—Appeal from the Circuit Court of Coles County; the Hon. FRANK K. DUNN, Judge presiding. Heard in this court at the May term, 1902. Affirmed. Opinion filed November 1, 1902.

CHARLES C. LEE, attorney for appellant.

S. S. ANDERSON and A. J. FRYOR, attorneys for appellees.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

The declaration, in assumpsit, by appellant against appellees, states, in effect, that Ellen Theaker died intestate and left the plaintiff and the defendants her only heirs at law; after her death, her estate owed $102 for physician's services during the last sickness; $329.12 funeral expenses and $30 for attorney's services rendered in the probate of the estate, all of which plaintiff paid to protect and preserve the estate, and which, after the appointment of an administrator, she probated against the estate, the same having been duly allowed, and that there were no assets in the hands of the administrator to pay the same; that the deceased owned certain real estate which descended to her heirs, in the following proportions: One-third to the plaintiff, one-third to the defendants John Rooney and James Rooney and Elizabeth Rooney, and one-third to the defendants Ellen Tangany, Patrick Tangany, Maggie Tangany and Eugene Tangany as tenants in common, and demands judgment against the defendants for the two-thirds of the amount so paid. The court sustained a

demurrer to the declaration, and gave final judgment in bar of the action, and to reverse the judgment this appeal is prosecuted, it being assigned and argued for error, the action of the court in sustaining the demurrer.

It is argued the plaintiff could maintain the suit under the provisions of section 12 of the statute of frauds. That section, however, gives a right of action only to a creditor of the deceased person, and appellant is not a creditor of the deceased. Besides, it is clear from the averments of the declaration, that the defendants are not liable to equal parts of the amount paid; if there be a liability each of them will be required to pay only a *pro rata* share. The sum due to appellant is not a debt due from the deceased, but the greater portion of it accrued against the estate after death, and it does not appear any one was personally liable for it, the liability being against the estate alone, which had descended to the parties to this suit, not in equal proportions, but in the manner stated in the declaration—one-third to plaintiff, one-ninth each to the three Rooneys and one-twelfth each to the four Tanganys. The suit being in assumpsit, the judgment would necessarily be the same against all, and such a judgment would not be proper, as by force of it any one of the defendants could be required to pay the whole of it and again be compelled to sue the co-defendants for contribution, thus perpetuating the litigation. They all should be required to pay the liability against the estate *pro rata* according to the respective shares inherited by them. Cutright v. Stanford, 81 Ill. 240. The remedy for such a contribution is in equity, so that complete justice may be done, and an end put to litigation. Indeed, as the declaration shows the proceeds of the sale of the real estate in the partition suit is still in the hands of the master in chancery, no good reason is perceived why an application could not be made to the court in that case, upon notice to the parties interested, and thus obtain, if so entitled, a modified order of distribution of the fund, to the end that complete justice may be done between the parties, and thus an end be put to the litigation. The judgment of the Circuit Court will be affirmed.

Toledo, St. Louis & Western R. R. Co. v. John W. Needham.

1. RAILROADS—*Fact that Fire Is Set by Sparks from Locomotive Makes a Prima Facie Case of Negligence.*—The fact that a fire is set by sparks from a locomotive makes a *prima facie* case of negligence and the burden is upon the railroad company to show that appliances for arresting sparks were of the most approved kind and were in good repair and that the engines were carefully and skillfully handled by a competent engineer.

2. EVIDENCE—*Of Condition of Engine During Preceding Winter.*—Evidence as to the defective condition of spark arresters on engines during the winter before the fire occurred, is inadmissible, as being too remote.

Trespass on the Case.—Damage to orchard by fire. Appeal from the Circuit Court of Cumberland County; the Hon. HENRY VAN SELLAR, Judge presiding. Heard in this court at the May term, 1902. Reversed and remanded. Opinion filed November 24, 1902.

CHARLES A. SCHMETTAU and C. M. CONNOR, attorneys for appellant; CLARENCE BROWN, of counsel.

J. F. HUGHES, W. C. GREATHOUSE and LYLE DECIUS, attorneys for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

Appellee recovered a judgment of $155 against appellant for damages done to his apple trees, which were burned by a fire set out by one of appellant's engines. Appellee's orchard is on the south side of appellant's railroad track. On the 8th of April, 1901, a fire started in the orchard and damaged sixty-two trees to the extent of $2.50 each, as estimated by witnesses. No one saw the fire start. It did not start on the right of way, but about ninety feet south of it. While there is some contention that there was no evidence that it was started by sparks from one of appellant's engines, we think that the jury were justified in finding from the circumstances in proof, that it was. There was no fire in the orchard when appellee left it about noon, to go to his dinner. When he returned less than an hour

afterward he saw it burning. Three trains had passed in the meantime. A *prima facie* case of negligence, therefore, was made out by appellee, and the court properly refused, at the conclusion of the testimony for him, to instruct the jury to return a verdict of not guilty.

To overcome appellee's *prima facie* case, the burden was upon appellant to show that appliances for arresting sparks on each of the three engines in question were of the most approved kind and were in good repair, and that each engine was carefully and skillfully handled by a competent engineer. Appellant showed that all three of the engines were skillfully handled by competent engineers and that they were equipped with spark arresters of the most approved kind. It was shown that two of the engines, numbers 50 and 70, were inspected on the 6th and 9th of April, and that the spark arresters were properly set and in good repair. The same was found to be true with reference to the other engine, No. 36, which was inspected April 2d and 9th. Whether, in the absence of proof that the arresters had not been tampered with after the fire and before the inspection on the 9th, the evidence was such as to require that they should be in good condition at the time of the fire, was a question for the jury, and one about which we do not care to express our views at this time.

To meet appellant's proof appellee introduced in rebuttal two witnesses, who testified that they had noticed during the preceding winter and at various other times, showers of sparks thrown by appellant's engines, and had seen large quantities of cinders on the ground, from twenty to one hundred feet from the right of way. It was not pretended that either of the engines in question threw the sparks or cinders testified to. There is no possible view in which testimony so remote could be admissible. The condition of the spark arrester on some of appellant's engines during the winter before may have been bad, or the engine may have been improperly or unskillfully managed, but it is difficult for us to see how either one of those facts would tend to prove that the engines in question were in bad condition on the 8th of April, or not properly managed.

For error in admitting the testimony of the two witnesses in rebuttal the judgment must be reversed.

We think, also, that the jury should have answered the sixth, seventh and eighth special interrogatories propounded at the instance of appellant. We see nothing wrong with the instructions.

Judgment reversed and cause remanded.

Chicago, Peoria and St. Louis Ry. Co. v. Joseph Bourne.

1. RAILROADS—*Duty to Keep Fences in Repair.*—It is the duty of a railroad company to keep its fences in repair, and abutting land owners have a right to assume that it will do so.

Statutory Action, for killing of stock by railroad. Appeal from the Circuit Court of Morgan County; the Hon. OWEN P. THOMPSON, Judge presiding. Heard in this court at the May term, 1902. Affirmed. Opinion filed November 1, 1902.

L. O. VAUGHT, attorney for appellant; BLUFORD WILSON and PHILIP BARTON WARREN, of counsel.

ROBERT TILTON, attorney for appellee.

MR. JUSTICE BURROUGHS delivered the opinion of the court.

This was an action commenced before a justice of the peace of Morgan county by the appellee against the appellant, to recover damages and attorney fees under the statute for seventeen hogs killed by the trains of the appellant while on the tracks, where they had strayed through an insufficient fence between his pasture and its right of way.

The case was first tried before the justice and afterward by jury in the Circuit Court, where it resulted in a verdict and judgment in favor of the appellee for $112 damages and $35 attorney fees.

The appellant moved for a new trial, which being denied, it excepted, and prosecutes this appeal, arguing for error that the verdict and judgment are not supported by the evidence.

It appears that a number of years ago the railway company placed a fence on a line dividing its right of way from appellee's pastures, and on account of its age and the neglect of appellant to repair it throughout its length, it had become so rotten in places that the hogs in question strayed from appellee's pasture through the fence upon the right of way of the appellant and were killed by the passing trains of the appellant.

After some of the hogs had been killed the appellee requested the appellant to repair the fence, and it did fix a part, but not all of it along appellee's pasture.

It is contended that appellee was guilty of contributory negligence in permitting his hogs to remain in his pasture after he discovered the fence was insufficient to keep them off the railroad right of way. But we can not concur in that view, for the railway company had a fence on the line, and the appellee had the right to have his stock in his pasture, putting the risk of loss by neglect to repair and keep the fence sufficient, upon the railway company, on which the statute imposes that duty; and the "mere leaving them there is not negligence nor evidence of negligence on his part, which a jury should be allowed to consider. The law should not, and does not, in our opinion, oust him, nor permit a jury to oust him, of the valuable use of his own land for that cause, in such a case." Terre Haute & Indianapolis R. R. Co. v. McCord, 56 Ill. App. 173.

The evidence warranted the verdict and judgment, and the latter is affirmed.

In Re the Petition of William McCaleb, in the Matter of the Coon Run Drainage and Levee District.

1. APPEALS—*Under Sec. 58 of the Levee Act.*—The only appeals allowed by law under section 58 of the levee act are to the Supreme Court, where the confirmation of special assessments is involved, and to the Circuit Court in other cases, where the orders are of a final character.

In Re Petition of William McCaleb.

Petition to Set Aside Order of Approval of Report of Commissioners of Drainage District.—Appeal from the County Court of Morgan County; the Hon. CHARLES A. BARNES, Judge presiding. Heard in this court at the May term, 1902. Dismissed. Opinion filed November 1, 1902.

J. M. RIGGS, attorney for appellant.

WORTHINGTON & REEVE, attorneys for appellee.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

Strueter and Purnell, two of the commissioners of Coon Run Drainage District, made a report to the County Court under section 41 of the levee act, concerning drainage, which was by the court approved July 31, 1901, after which and at the ensuing December term of the County Court the appellant, McCaleb, the other commissioner, filed his petition alleging wherein the report of the commissioners was wrong, and taking exceptions thereto, in which he asked the court to set aside the order of approval and for a further hearing upon such report; the court sustained a demurrer to the petition and entered its final order dismissing it, from which order appellant obtained and perfected the present appeal to this court.

A motion has been entered in this court to dismiss the appeal herein for the reason, as has been alleged and argued, that such appeal does not lie from the County Court to this court, but only to the Circuit Court. It is objected by the counsel for appellant that the motion has not been made by the proper parties. If we have no jurisdiction of the appeal, it will subserve no good purpose to discuss the question who in fact are the interested parties, Strueter and Purnell, or the drainage district, for the purpose of making such motion. If this court is without jurisdiction of the subject-matter of the appeal and another court had such jurisdiction, we would be required to dismiss it of our own motion.

In Allman et al. v. Lumsden et al., 48 Ill. App. 17, where an order was made by the County Court annexing lands to the district under the provisions of section 58 of the same

act, this court held that the appeal from such an order was direct to the Circuit Court and not to this court; that the only appeals under the act in question allowed by law are to the Supreme Court where the confirmation of special assessments is involved, and to the Circuit Court in other cases, where the orders are of final character. We are unable to perceive any reason for prosecuting the present appeal to this court, when the one in the case cited would not lie. The reasoning applies alike to both cases. The appeal should have been taken to the Circuit Court, and it will be dismissed.

A. W. Heinly v. Eva Goldberg.

1. EVIDENCE—*Where it is Conflicting it is the Jury's Province to Find the Truth.*—Where the evidence is conflicting it is the peculiar province of the jury to find the truth, and this court will not feel justified in disturbing a judgment that is clearly supported by the evidence produced by the plaintiff, although the evidence for the defendant may, on the face of the transcript, appear to preponderate in his favor.

Assault and Battery.—Appeal from the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge presiding. Heard in this court at the May term, 1902. Affirmed. Opinion filed November 1, 1902.

MABIN & CLARK, attorneys for appellant; J. B. MANN, of counsel.

KIMBROUGH & MEEKS, and O. M. JONES, attorneys for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

In a suit for damages for an assault and battery upon her person, appellee recovered a judgment against appellant for $500. In seeking a reversal, appellant urges that the verdict is against the evidence, and that the court improperly instructed the jury.

The evidence shows that prior to the assault complained of appellant, and appellee's brother, Solomon Goldberg,

were partners in business at Danville, Ill., and that appellee had been employed as bookkeeper for the firm. In October, 1901, appellant filed a bill to dissolve the partnership and obtained a temporary injunction restraining his partner from interfering with the property of the firm. A few days thereafter, appellant, with three other men, broke into the room where the partnership property was kept and proceeded to remove it. After they had removed the most of the property appellee appeared upon the scene and vigorously protested against the removal of the property during the absence of her brother, who was at that time out of the city, and especially to the removal of a certain desk which she claimed belonged to her brother and contained nothing not belonging to herself or brother. There is a sharp conflict in the testimony as to what then occurred. Appellee testified that when appellant and his assistants, in disregard of her protests undertook to remove the desk, she sat upon it; that appellant then struck her on the hand and breast, and that he seized her hand and forced her from the desk by twisting her arm, and that he thereby so injured her as to necessitate the attendance of a physician, and her confinement in a hospital for twelve days. Appellant denied striking her and testified that what was done by him in that regard was simply to keep her from assaulting him. He was corroborated by two men who were assisting him in removing the property.

In the conflict, it was the peculiar province of the jury to find the truth; and while the testimony as it appears in the transcript seems to preponderate in favor of appellant, we do not feel justified in reversing the judgment for the reason that the finding is against the evidence. As has been frequently said by this court and the Supreme Court, the jury and the trial judge are in so much better position to judge of the credit to be given to the witnesses than are we, who have no opportunity of seeing them and of observing their manner while testifying, that we do not feel justified in disturbing a judgment that is clearly supported by the evidence produced by the plaintiff, although the evi-

dence for the defendant may, on the face of the transcript, appear to preponderate in his favor.

We see no error in any of the instructions given for appellee. There was no error in ruling upon the admission of testimony and the appellant has had a fair trial.

Judgment affirmed.

Benton Aleshire v. Lee County Savings Bank.

1. MORTGAGES—*When Contemporaneous Parol Agreements Not Included in Mortgage May Be Shown.*—A contemporaneous parol agreement not included in the mortgage may be shown when such an agreement would render the mortgage void as against third parties under our statute.

2. SAME—*Third Party May Prove Fraudulent Intention of Parties.*—A third party may prove the fraudulent intention of the parties to the mortgage, although such proof does contradict the express terms thereof.

3. INSTRUCTIONS—*That Mortgage Is Not Invalidated by an Agreement Between the Parties that Mortgaged Property May Be Sold.*—An instruction to the effect that the mortgage was not invalidated by reason of the mortgagee ratifying sales made by the mortgagor of the mortgaged property, or by reason of the mortgagee authorizing the mortgagor to sell the same provided the proceeds of such sale were accounted for to the mortgagee by him, is erroneous for the reason that the mortgage would be void as against defendant, if he was a *bona fide* purchaser of the property for value without notice.

Replevin.—Appeal from the Circuit Court of Hancock County; the Hon. JOHN A. GRAY, Judge presiding. Heard in this court at the May term, 1902. Reversed and remanded. Opinion filed November 1, 1902.

D. E. MACK and W. H. HARTZELL, attorneys for appellant.

APOLLOS W. O'HARRA, attorney for appellee.

MR. JUSTICE BURROUGHS delivered the opinion of the court.

On April 23, 1901, the appellee, Lee County Savings Bank, a corporation, by an appropriate proceeding instituted by it in the Circuit Court of Hancock County against the appellant, Benton Aleshire, replevied from him fifteen

two-year old black steers which it claimed were of the Pole Angus breed and were included in a chattel mortgage which it held from John W. Laswell and wife.

The appellant defended the proceeding upon the ground that the steers belonged to him as purchaser from Laswell for full value paid, and that they were not the same steers which were described in the mortgage, and if they were, the mortgage was invalid as against third parties by reason of an agreement which was made between the appellee (mortgagee) and Laswell and wife (mortgagors) when the mortgage was executed, to the effect that they (Laswell and wife) might sell the steers included in the mortgage whenever they saw fit, the same as though no mortgage had been given upon them.

The jury found a verdict in favor of the appellee, and the appellant moved for a new trial, which the court denied, and gave judgment on the verdict.

The appellant preserved an exception, brings the proceeding to this court by appeal, and to reverse the judgment argues for error that the court refused to admit proper evidence offered by him; admitted improper evidence offered by appellee; gave improper instructions for the appellee; refused improper instructions for appellant; and that the verdict and judgment are against the law and the evidence.

John W. Laswell was a cattle buyer, feeder and shipper, and had in his possession a large farm in sections 26 and 35, in Dallas township, Hancock county, Illinois, called in this record the "B. F. Johnson farm," where he bought, fed and sold cattle quite extensively. On December 9, 1899, he bought 227 young steers from Bowles Livestock Commission Company of Kansas City, Missouri, a part of which were "Pole Angus" and part white-faced "Herefords." These steers were shipped to the "Johnson" farm, and to enable Laswell to pay for them, he borrowed $9,000 from the appellee and gave it the note of himself and wife, dated December 11, 1899, for that amount, payable one year after date, with seven per cent interest, and secured the note by giving the appellee a chattel mortgage of the same

date, signed by himself and wife, properly acknowledged and recorded in said Hancock county, and by it, among other chattels, they mortgaged "227 head of two-year old steers, all dehorned, 112 being black Pole Angus and 115 being white-faced Herefords, all bought of Bowles Live-stock Commission Co. at Kansas City, Mo., Dec. 9, 1899, by draft of J. W. Laswell on Lee County Savings Bank."

On October 16, 1900, being after the chattel mortgage had been duly acknowledged and recorded, the appellant, for full value paid, purchased from Laswell the fifteen steers in question, they, together with a number of others, being then on the "Brill" farm, some six or eight miles distant from the "Johnson" farm.

There was a sharp conflict in the evidence as to whether or not the fifteen steers answered to the description of the Pole Angus steers included in the mortgage, and the appellant offered to show by Laswell and his wife that there was an agreement made between them and the appellee, by its cashier, at the time the chattel mortgage was executed, to the effect that they (the mortgagors) might sell and dispose of any or all of the steers included in the mortgage at any time they thought best, the same as if the mortgage had not been given upon them, but the court refused to admit the offered testimony upon special objection by counsel for the appellee to the effect that such testimony was improper for the reason that it was incompetent for the appellant to prove a contemporaneous parol agreement not included in the mortgage and at variance with the express terms thereof, and the appellant preserved an exception.

The appellant testified to the effect that at the time he purchased the steers from Laswell, he (appellant) did not know they were mortgaged to the appellee, but understood that they were mortgaged to the Iowa Livestock Commission Company of Chicago, and that at the request of Laswell, the purchase price of the steers was paid by him to that company. After which, over the objection and exception of the appellant, the court permitted the appellee to introduce the chattel mortgage from Laswell to the Iowa

Livestock Commission Company referred to by the appellant, from which it appeared the steers did not answer the description of those in question.

We are satisfied that the court properly admitted in evidence the chattel mortgage of Laswell to the Iowa Livestock Commission Company, because it was competent to explain away the claim made by the appellant that the steers were included in that mortgage. But we think that the court erred in excluding the offered testimony of Laswell and wife for the reason that it was proper for the appellant to show, if he could, that they, the mortgagors, in the mortgage to the appellee under which it claimed the steers in question, made an agreement with the mortgagee (appellee), at the time the mortgage was executed, to the effect that they (the mortgagors), might sell the steers included in the mortgage at any time they saw fit, as if they were not mortgaged, for such an agreement would render the mortgage void as against third parties under our statute. William Deering Co. v. Washburn, 141 Ill. 153.

The appellant was not a party to the mortgage, nor was he claiming the steers in any way under it so as to make him a privy thereto, but he was insisting that the steers in question were not the steers described in the mortgage, or if they were, then the mortgage was void as against him, a third party, by reason of the agreement, and therefore he was not precluded from proving the fraudulent intention of the parties to the mortgage, although such proof did contradict the express terms thereof. 1 Greenl. Ev., Sec. 279; 2 Wharton Ev., Sec. 920; and Chicago, Springfield & St. L. R. R. Co. v. Beach, 29 Ill. App. 157.

It would be entirely different if the appellant was claiming the steers under the chattel mortgage instead of against it. Schultz v. Plankinton Bank, 141 Ill. 116.

The evidence was conflicting as to whether the fifteen steers in controversy were of the "Pole Angus" or "Gallaway" breed and whether they were one or two years old at the time the mortgage was given, and with the evidence in that condition, the court, by appellee's seventh

given instruction, required the jury to believe from the evidence, in order to find for the appellee only, that the steers in dispute were a part of those purchased from the Bowles Livestock Commission Company, whereas the jury should have been required to believe further that the steers were of the "Pole Angus" breed and about two years old, so that when the appellant purchased them, he could have been apprised by those facts and the description in the mortgage that they were included in it, and it was prejudicial error to give the instruction with that omitted.

The court also committed prejudicial error against the appellant by giving appellee's thirteenth and fourteenth given instructions, to the effect that the mortgage was not invalidated by reason of the appellee ratifying sales made by Laswell of the mortgaged property, or by reason of the appellee authorizing Laswell to sell same provided the proceeds of such sale were accounted for to the appellee by him, for the reason that the mortgage would be void as against the appellant if he was a *bona fide* purchaser of the steers for value as claimed, and such sales by Laswell (the mortgagor) were authorized or consented to by the appellee (the mortgagee) although Laswell paid the proceeds of such sale to appellee. Deering Company v. Washburn, *supra;* Huschle v. Morris, 131 Ill. 587.

By appellant's third refused instruction, it was sought to have the court inform the jury that it was the duty of the appellee to see to it that the steers in question, if they were intended to be included in the mortgage, were truly described therein, so that the appellant, and others, might not be misled as to that; and that the description of them given in the mortgage must control. Inasmuch as that question was not covered by any other instruction which was given, and was involved in the case under the evidence, that instruction should have been given and it was prejudicial error for the court to refuse it.

For the errors above indicated, the judgment of the Circuit Court is reversed and the case will be remanded for another trial.

Charles I. Imes, Adm'r, v. The Chicago, Burlington & Quincy R. R. Co.

1. ORDINANCES—*Part Void and Part Valid.*—Where one part of an ordinance is void and another part valid, the void part can not have the effect to render the whole ordinance void.

2. RAILROADS—*Plaintiff Must Prove that Deceased Was Exercising Ordinary Care to Avoid Injury.*—Although at the time of the injury the railroad may have been running its train at a high and unusual rate of speed, at a rate prohibited by ordinance, and may have failed to comply with the statute requiring a bell to be rung, or a whistle to be blown, the burden is still on the plaintiff to prove that the deceased at the time of the accident was in the exercise of ordinary care to avoid injury.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of McDonough County; the Hon. JOHN A. GRAY, Judge presiding. Heard in this court at the May term, 1902. Affirmed. Opinion filed November 24, 1902.

SWITZER & MELOAN, attorneys for appellant.

SHERMAN, TUNNICLIFF & GUMBART, attorneys for appellee; CHESTER M. DAWES, of counsel.

MR. JUSTICE HARKER delivered the opinion of the court.

This suit was brought by appellant as the administrator of James J. Windsor, deceased, to recover damages for the killing of deceased by a train while he was attempting to cross appellant's railroad at a street crossing in the city of Colchester, Illinois. When killed, deceased was riding in a wagon, drawn by two mules which he was driving.

The declaration contains four counts. The first count charges that the defendant carelessly and improperly managed the locomotive and train; the second count charges a violation of the statutory duty to ring the bell and blow the whistle; the third count charges that the train was run in violation of a speed ordinance of the city; and the fourth count charges that the train was run at a great and dangerous rate of speed, without keeping a proper lookout, etc. The court sustained a demurrer to the third count because of the invalidity of the ordinance on which it was

based. The ordinance made it unlawful to propel a locomotive or car within the city at a greater rate of speed than ten miles per hour, or "at any speed so as to endanger the safety of persons or property while passing across or over the track of any railroad in the city." Issue was taken on the other three counts and a trial was had by jury. At the conclusion of the evidence, the court, upon the motion of defendant, peremptorily instructed the jury to return a verdict for the defendant.

In seeking a reversal of the judgment appellant urges:

1. That the court erred in sustaining a demurrer to the third count of the declaration.

2. That the court erred in instructing the jury to return a verdict for the defendant.

While cities and villages may, by ordinance, regulate the speed of railroad trains within their corporate limits, it is expressly provided by section 87, chapter 114, Hurd's revision of the Illinois statutes, that "no such ordinance shall limit the rate of speed in case of passenger trains to less than ten miles per hour, nor in any other case to less than six miles per hour." It is clear that the city council of Colchester had no power to limit the rate of speed below that mentioned in the statute, and that part of the ordinance in question which makes it unlawful to run "at any speed so as to endanger the safety of persons or property while passing across or over the track of any railroad in this city," is void. As one part of the ordinance does limit the rate of speed to ten miles per hour, it is contended that the void part can not have the effect to render the whole ordinance void. We are inclined to that view, and the following authorities are in point: Kettering v. the City of Jacksonville, 50 Ill. 39; Harbaugh v. City of Monmouth, 74 Ill. 367; City of Quincy v. Bull, 106 Ill. 337. The court erred in sustaining a demurrer to the third count. But is the error such a one as to require a reversal of the judgment? By taking this count out of the declaration the plaintiff was precluded from introducing any proof, excepting the ordinance itself. All proofs that could have been produced under that count, except the ordinance, were introduced

under the other counts. If we can say that the court, with all the evidence contained in this record and the additional evidence of the ordinance, should have directed a verdict for the defendant, then the error is not sufficient to reverse. This brings us to a discussion of the other point of contention.

The evidence shows that deceased drove upon the railroad track in a trot; that he did not look in the direction from which the train was coming, although there was an unobstructed view in that direction for a distance of two miles; that there was level ground and ample room to turn his team had he seen the train and desired to do so. He was evidently thinking about other things than the dangers of the place and was oblivious to his surroundings. He used neither eyes nor ears. He did not approach the crossing as though it was a dangerous place and as a careful and prudent man would have done. There was lacking that element of proof necessary to the plaintiff's case. The defendant may have been running its train at a high and unusual rate of speed, at a rate prohibited by ordinance; it may have failed to comply with the statute requiring a bell to be rung, or a whistle to be blown, but the burden was still on the plaintiff to prove that the deceased at the time of accident was in the exercise of ordinary care to avoid injury. C., B. & Q. R. R. Co. v. Johnson, 103 Ill. 512; C., M. & St. P. Ry. Co. v. Halsey, 133 Ill. 248; Lake Shore and M. S. Ry. Co. v. Hessions, 150 Ill. 546; C., B. & Q. R. R. Co. v. Gunderson, 74 Ill. App. 356.

The doctrine of comparative negligence is no longer the law of Illinois. To entitle appellant to recover in this case, it devolved upon him to prove the averment in his declaration that the deceased was, at the time he met his death, in the exercise of ordinary care for his own safety. As he failed to do that, and the proofs, on the contrary, show that the deceased was unmindful of the dangers surrounding him, and neither looked nor listened before driving upon the railroad, the Circuit Court properly directed a verdict for appellee.

Judgment affirmed.

John Boatman et al. v. The Estate of Emory M. Boatman, by Mark Boatman.

1. WILLS—*Statutory Requirements.*—Our statute requires that "wills, testaments and codicils, by which any lands * * * and chattels are devised, shall be reduced to writing, and signed by the testator or testatrix * * * and attested in the presence of the testator or testatrix, by two or more credible witnesses, two of whom, declaring on oath or affirmation, before the County Court of the proper county, that they were present and saw the testator or testatrix sign said will, testament or codicil, in their presence, or acknowledged the same to be his or her act and deed, and that they believed the testator or testatrix to be of sound mind and memory at the time of signing or acknowledging the same, and such evidence shall be sufficient proof of the execution of said will, testament or codicil, to admit same to record; * * and every will, testament or codicil, when thus proven to the satisfaction of the court, shall be * * * good and available in law for the granting, conveying and assuring the lands, tenements and hereditaments, annuities, rents, goods and chattels therein devised, granted and bequeathed."

2. SAME—*Sufficient Document.*—The following writing was offered for probate:

"This is to certify that Mark Boatman is holding in trust, the land willed to Emory M. Boatman by his father, and his building and loan stock, being in Edgar County Building and Loan Co.; also his share of part of his brother's estate, C. E. Boatman, all of which is to be returned to the said Emory M. Boatman, if anything might happen to Mark Boatman, or at Emory Boatman's option or will; and also be it understood that if anything might happen Emory M. Boatman that all of his private belongings, *whatever* they may be, are to go to Mark Boatman. This to be signed in duplicate.

All of State of Illinois, and Edgar Co., Mch. 16, 1900.

W. P. HOUSTON, (Signed) MARK BOATMAN,
MICHAEL HOOVER. EMORY M. BOATMAN."

Held, that as the writing was written by the deceased, and the words "be it understood that if anything might happen Emory M. Boatman that all his private belongings, whatever they may be, are to go to Mark Boatman," indicate clearly that the deceased intended by it to give his property to his brother Mark, to take effect at the death of the deceased, it is sufficient in form to constitute his will.

Appeal from an Order Admitting a Will to Probate.—Appeal from the Circuit Court of Edgar County; the Hon. FRANK K. DUNN, Judge presiding. Heard in this court at the May term, 1902. Affirmed. Opinion filed November 1, 1902.

H. S. TANNER, attorney for appellants.

J. W. HOWELL, attorney for appellee.

MR. JUSTICE BURROUGHS delivered the opinion of the court.

The appellee, Mark Boatman, presented to the County Court of Edgar County, the writing hereinafter set forth, and prayed that it be probated as the last will and testament of his brother Emory M. Boatman, deceased; and the court, after a hearing, entered an order finding it was not such will and refused to admit it to probate.

The appellee appealed from that order to the Circuit Court of that county, and after a hearing, the Circuit Court entered an order finding the writing to be such will and admitting it to probate.

From the order of the Circuit Court the appellants, John Boatman et al., who are brothers and sisters of the deceased, prosecute this appeal, and to effect a reversal of it, argue for error that the writing is not sufficient in form to show that the deceased intended by it to make disposition of his property to take effect at his death.

The writing is as follows:

"This is to certify that Mark Boatman is holding in trust, the land willed to Emory M. Boatman by his father, and his building and loan stock, being in Edgar County Building and Loan Co.; also his share or part of his brother's estate, C. E. Boatman, all of which is to be returned to the said Emory M. Boatman, if anything might happen to Mark Boatman, or at Emory Boatman's option or will; and also be it understood that if anything might happen Emory M. Boatman that all of his private belongings, *whatever* they may be, are to go to Mark Boatman. This to be signed in duplicate.

All of State of Illinois, and Edgar Co., Mch. 16, 1900.

W. P. HOUSTON, (Signed) MARK BOATMAN.

MICHAEL HOOVER. EMORY M. BOATMAN."

Our statute provides:

"Wills, testaments and codicils, by which any lands, * * * goods and chattels are devised, shall be reduced to writing and signed by the testator or testatrix * * * and attested in the presence of the testator or testatrix, by two or more credible witnesses, two of whom, declaring on oath or affirmation, before the County Court of the proper county, that they were present and saw the testator or testatrix sign said will, testament or codicil, in their presence, or acknowledged the same to be his or her act and deed,

and that they believed the testator or testatrix to be of sound mind and memory at the time of signing or acknowledging the same, shall be sufficient proof of the execution of said will, testament or codicil, to admit same to record; * * * and every will, testament or codicil, when thus proven to the satisfaction of the court, shall be * * * good and available in law for the granting, conveying and assuring the lands, tenements and hereditaments, annuities, rents, goods and chattels therein and thereby devised, granted and bequeathed. Hurd's Ill. Stat., 1901, Ch. 148, Sec. 2."

There is no conflict in the evidence but that the deceased was fifty years old, of sound mind and memory when he executed the writing in the presence of W. P. Houston and Michael Hoover, two credible persons, who at his request signed the same in his presence and in the presence of each other, for the express purpose of being attesting witnesses thereto, and that they declared on oath before the court that they believed the deceased to be of sound mind and memory at the time he signed the writing. The deceased was poor in health when he executed the writing and took great care to preserve it until he died, a year afterward; and before it was executed, he stated that he intended his brother Mark to have his (deceased's) property at his death, and after it was executed, the deceased told one of the subscribing witnesses that this writing was made so that Mark would get his (deceased's) property at his (deceased's) death.

The writing was written by the deceased, and it seems to us that the words "be it understood that if anything might happen Emory M. Boatman that all his private belongings, whatever they may be, are to go to Mark Boatman," when considered in connection with the whole writing and the statements of the deceased with reference thereto, and its careful preservation by him, indicate clearly that the deceased intended by it to give his property to his brother Mark, to take effect at the death of the deceased; and therefore the writing manifesting such intention, is sufficient in form to constitute his will (Robinson v. Brewster, 140 Ill. 644), and the order of the Circuit Court so finding and declaring, is for that reason affirmed.

U. E. Harmison v. Thomas Fleming et al.

1. EVIDENCE—*Writing Exhibited to Oppose Party During Controversy.*—A voluntary statement of a stranger to the suit contained in a writing is not admissible in evidence, simply because it was brought to the attention of the opposite party in a conversation with him before the trial. It is mere hearsay.

2. INSTRUCTIONS—*Submitting a Question of Law to the Jury.*—An instruction which states, in effect, that defendant is liable if without good cause, and validly under the law, he repudiated his contract and refused to deliver the goods, is improper as submitting a question of law to the jury.

Assumpsit, on a contract of purchase and sale of grain. Appeal from the Circuit Court of Shelby County; the Hon. SAMUEL L. DWIGHT, Judge presiding. Heard in this court at the May term, 1902. Reversed and remanded. Opinion filed November 1, 1902.

E. A. RICHARDSON and R. M. PEADRO, attorneys for appellant.

WALTER C. HEADEN, attorney for appellees.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

Appellees brought this suit against appellant before a justice of the peace for damages for failure to deliver 1,800 bushels of yellow corn according to the alleged terms of a contract of purchase and sale between the parties. The case, having been appealed to the Circuit Court, was there tried by a jury, resulting in a verdict and judgment against appellant for $126, to reverse which this appeal is brought to this court, where the reasons for such reversal chiefly argued are, that the court admitted improper and rejected material evidence tendered by appellant, and gave wrong instructions to the jury.

Appellees purchased of appellant 1,800 bushels of corn at forty-six cents a bushel, to be delivered at Bethany after his oats were harvested. Fleming, one of appellees, testified the contract of purchase was made between seven and eight o'clock of the morning of July 20, 1901, and that he

informed appellant that the price of corn was then forty-five cents, but he would pay one cent more. Appellant testified that appellees insured him that the price of forty-six cents was three cents more than the price at Findlay, a neighboring station. Soon after the contract was made appellant notified appellees he was dissatisfied with the sale for the reason that he had been informed they had misrepresented the price of corn to him, and later appellant refused to deliver the corn, but sold and delivered it to another person. Appellant finished harvesting his oats August 12th or 13th and at that time the price of corn at Bethany was fifty-three cents.

In one of the conversations between Fleming and appellant about the contract, after it was made, Fleming, to convince appellant that he had correctly stated the price of corn to him when he purchased it, exhibited to the latter a writing signed by T. L. Bone, another grain dealer at Bethany, in which it was certified that on July 20th, his firm was paying forty-five cents for yellow corn, and forty-seven cents for white corn. The court, over the objection of appellant, admitted this paper in evidence. The appellant offered to prove the price of corn at Findlay, and that it was fifty cents then, July 20th, but the court sustained an objection to such evidence and refused to admit it. The court also refused to allow appellant upon the cross-examination of appellees' witnesses, to show the price of corn at any other time than the precise time of the contract, between seven and eight o'clock of July 20th, either in the forenoon or afternoon of that day. These various rulings of the court upon the evidence are argued as prejudicial error by the appellant.

Because the court strictly held appellant and confined his evidence to the exact time appellee Fleming testified the contract was made relative to the price of corn, the same ruling applied to appellees would have excluded the papers signed by Bone. In its statement concerning the price of corn it was not confined to the time of the contract, but included every hour of the day. The same

strictness or liberality of ruling should be extended to both parties alike. Moreover it was merely the voluntary statement of a stranger to the suit and in the form it was presented to the jury was but mere hearsay. The fact that it was brought to the attention of appellant in a conversation with him gave to it no probative force; and if parties could thus secure the statement of outsiders and by the sanction of calling the attention of his adversary to them, render them admissible in evidence against their opponents, we could imagine that the sanction of an oath would soon be obsolete. The paper was inadmissible as evidence, and in the ruling of the court in that respect there was prejudicial error.

Again appellant had testified Fleming insured that forty-six cents was three cents more than the price at Findlay. Whether this was true or not, and whether appellant relied upon the guaranty, was a question of fact for the jury to decide, and such evidence laid the foundation for the introduction of the evidence that was offered by appellant that the price of corn was fifty cents at Findlay on the day of the contract. If appellees undertook by their contract to insure the price agreed to be paid for the corn was three cents more than the then price at Findlay, or if they falsely so represented the price of corn, either would be a good defense to the action, and it was prejudicial error for the court, as it did, to reject the evidence offered.

Complaint is also made as to the instructions in the case. Upon the evidence as it was before the jury, it may be there were no prejudicial errors sustained in them, for the effect of the court's rulings was to exclude any defenses to the action. But inasmuch as we will remand the cause for a new trial, it may be well for us to indicate a few general inaccuracies in order that counsel and court may not infer that we have, by not referring to them, approved them. The first instruction improperly submits a question of law to the jury, wherein it states, in effect, that appellant is liable, if without good cause, and validly under the law, he repudiated his contract and refused to deliver the corn.

What is good and valid cause is a question of law to be defined by the court. The second instruction, like the first, contains the same infirmity. The third instruction informs the jury that both parties are equally bound by the contract, and neither can escape performance. This instruction ignores the defense of appellant; and neither is the principle of the instruction correct abstract law; and the fourth instruction is susceptible to the same objection so far as it relates to the price of corn. The eighth instruction would be wrong had appellant been allowed to make his defense; and for the same reason the court would be required to give to the jury the instructions requested by appellant upon this point, and which were refused.

For the errors indicated in the rulings of the trial court upon the evidence of the cause, the judgment will be reversed and the cause remanded for a new trial.

City of Windsor v. The Cleveland, Cincinnati, Chicago & St. L. Ry. Co.

1. CITY CHARTERS—*Provisions Repealed by State Constitution.*—Section 21, article 6, of the constitution of 1870, providing that justices of the peace, police magistrates and constables shall be elected in and for such districts as are or may be provided by law, and the jurisdiction of such justices of the peace and police magistrates shall be uniform, repeals that part of a city charter granting to the president of the city council exclusive jurisdiction in all cases arising under the ordinances of the corporation, and concurrent power and jurisdiction with justices of the peace in all civil and criminal cases within the county, arising under the laws of this state.

2. APPEALS—*From Judgment Rendered by a Person Possessing No Judicial Powers.*—The taking of an appeal from a pretended judgment rendered by a person possessing no judicial powers, will not give the Circuit Court jurisdiction.

3. PRACTICE—*Questions of Jurisdiction Raised by Motion to Dismiss Suit.*—The question of jurisdiction may be raised by motion to dismiss the suit.

Prosecution for Violating an Ordinance.—Appeal from the Circuit Court of Shelby County; the Hon. SAMUEL L. DWIGHT, Judge presiding.

Heard in this court at the May term, 1902. Affirmed. Opinion filed November 1, 1902.

R. M. PEADRO and E. A. RICHARDSON, attorneys for appellant.

GEORGE F. MCNULTY and HAMLIN & KELLY, attorneys for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

The city of Windsor was incorporated in 1865 by special act of the legislature which gave to the president of the city council "exclusive jurisdiction in all cases arising under the ordinances of the corporation and concurrent power and jurisdiction with justices of the peace in all civil and criminal cases within the county of Shelby arising under the laws of this state." The city has continued under its special charter since that date.

On the 20th of August, 1901, R. M. Tull, as president of the city council, acting under the power conferred by the special charter, issued a summons against appellee to answer an alleged charge of violating an ordinance of the city by running a train of cars at a greater rate of speed than ten miles per hour within the corporate limits, and afterward rendered judgment against appellee for $50 and costs. An appeal was prosecuted to the Circuit Court where a motion was made by appellee and sustained by the court to dismiss the suit upon the ground that Tull, as president of the city council, had no jurisdiction to try cases for violation of an ordinance.

Section 21, article 6, of the constitution of 1870, is as follows:

"Justices of the peace, police magistrates and constables shall be elected in and for such districts as are, or may be, provided by law, and the jurisdiction of such justices of the peace and police magistrates shall be uniform."

The constitution is self-enacting and the section quoted had the effect to repeal that part of the charter of the city of Windsor, which gave to the president of the city council judicial power as a justice of the peace. Phillips v. Quick,

63 Ill. 445; People v. Palmer, 64 Ill. 41; Taylor v. Smith, 64 Ill. 445; Fisher v. National Bank, 73 Ill. 34; Hart v. People, 89 Ill. 407; Law v. People, 87 Ill. 385. Tull, as president of the city council, therefore, had no authority to issue the summons, try the cause or render judgment.

It is contended by appellant, however, that by prosecuting an appeal from the judgment, appellee acknowledged the jurisdiction of Tull and gave to the Circuit Court full jurisdiction to try the case. It is a well-settled and familiar principle that an appeal from a judgment rendered against a defendant by a justice of the peace without jurisdiction of the defendant's person, gives the Circuit Court full and complete jurisdiction of his person. But the taking of an appeal from a pretended judgment rendered by a court without jurisdiction of the subject-matter, or by a person possessing no judicial powers, would not give the Circuit Court jurisdiction. An appeal from a pretended judgment entered by a constable assuming to act as a justice of the peace in the absence of that official would not give the Circuit Court jurisdiction to try the cause; and on motion of defendant, the suit should be dismissed for want of jurisdiction to try the cause. The judgment rendered by Tull has no greater force or dignity.

That the question of jurisdiction could be raised by motion to dismiss the suit, is abundantly established by authority. Phillips v. Quick, 63 Ill. 445; Taylor v. Smith, 64 Ill. 445; Frantz v. Fleitz, 85 Ill. 367.

The Circuit Court properly dismissed the suit and the judgment will be affirmed.

Laura B. Wheeler, Adm'x, v. James A. Wheeler.

1. COUNTY COURT—*Has Not Conferred upon It Any General Chancery Jurisdiction.*—The County Court has not conferred upon it any general chancery jurisdiction, but within the powers conferred upon it by the constitution and the statutes in pursuance thereof, it has

the powers and authority to administer equity principles incidentally necessary to the exercise of the jurisdiction it actually possesses.

2. SAME—*Power to Settle and Distribute the Personal Estate of Deceased Persons.*—The County Court has plenary power to settle and distribute the personal estate of deceased persons, and the necessary incidental power to clothe the administrator appointed by it, with the possession and control of the personal assets of deceased persons, without reference to any distinction between law and equity. Where any person has personal property, choses in action, or other assets in possession, to which the administrator lays claim, the County Court has full power to issue its citation against such person, and may thereupon determine the question of ownership of such property, when both the law and equity jurisdiction may be involved.

3. COURTS—*Mere Form of Application Is Not Material.*—The mere form of application to call into action the power of the court is not material, where the court in fact has jurisdiction of the subject-matter.

Probate.—Appeal from the Circuit Court of Fulton County; the Hon. JOHN A. GRAY, Judge presiding. Heard in this court at the May term, 1902. Affirmed. Opinion filed November 1, 1902.

CHIPERFIELD & CHIPERFIELD, attorneys for appellant.

WALTER H. KIRK and LUCIEN GRAY, attorneys for appellee.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

Appellee with his brother, the deceased, David M. Wheeler, in the lifetime of the latter, had been engaged in joint business together. Appellee purchased the half interest of his brother in such business, and among the assets so purchased were two promissory notes, of different persons, secured by real estate mortgages, one for $1,900, and another for $575, and thereafter appellee took the possession of the property and business appertaining to the joint enterprise of the brothers. David W. Wheeler died without having indorsed the notes above mentioned, to the appellee, or in any manner in writing did he transfer his half interest therein. Appellant was appointed administratrix of the deceased brother's estate by the County Court of Fulton County. Appellee applied to that court for an

order or decree directing the administratrix to make assignment of the notes in pursuance of the previous contract, entered into before the death of the decedent. The form of the application to the County Court was a bill in equity, upon which a summons issued, in the form of chancery process, against appellant, and the minor children of the deceased and their guardian. A motion was made in the County Court to dismiss the bill for want of jurisdiction of the court to entertain it, which motion was denied, and appellee then dismissed the proceeding as to all the defendants except the administratrix, and the court subsequently granted an order or decree in conformity with the prayer of the bill, from which an appeal was taken to the Circuit Court, and the motion to dismiss for the same reason was renewed and there again denied. Upon the hearing in the Circuit Court, a decree or order was again entered directing the administratrix to assign the notes to appellee, from which the present appeal is prosecuted, and the only question urged upon our attention, by which a reversal of the decree is sought to be accomplished is, whether the County Court had jurisdiction to entertain the bill for specific performance as it was filed in that court.

If the County Court had jurisdiction of the subject-matter, we are of the opinion that the mere form of the application would be immaterial, unless such form was prescribed by the statute by which such jurisdiction was conferred. No authority need be cited to prove that the County Court has not conferred upon it any general chancery jurisdiction, for all know that it has not. It is as equally familiar to all, that, within the powers conferred upon it by the constitution and the statutes in pursuance thereof, it has the powers and authority to administer equity principles incidentally necessary to the exercise of the jurisdiction it actually possesses. The County Court has plenary power to settle and distribute the personal estate of deceased persons, and the necessary and incidental power to clothe the administrator appointed by it, with the possession and control of the personal assets of deceased per-

sons, without reference to any distinction between law and equity. Where any person has personal property, choses in action or other assets in possession, to which the administrator lays claim, the County Court has full power to issue its citation against such person, and may thereupon determine the question of ownership of such property, when both the law and equity jurisdiction may be involved. These principles are so familiar as to need no authorities to prove them. The County Court then having jurisdiction over the personal estate of decedents, the legislature, in further recognition of such authority, by section 127, chapter 3, Rev. St., the administration act, provided that all contracts made by the decedent may be performed by the executor or administrator, when so directed by the County Court. No authority could be cited to make the plain language of this section clearer than it is. It means what the language imports. No form of application to call into action the power of the court to direct the performance of such contracts, is prescribed. As we said before, mere form is not material where the court in fact has jurisdiction of the subject-matter, and it is plain from what we have said, and much more that could be said, the jurisdiction to make such direction exists in the County Court. Merely to give the application the form and name of a bill in equity, when the court has no general chancery jurisdiction, does not make the application a bill in equity by any means, because there is no element of that sort in the court in which it can rest. The substance of the statement contained in the paper will be analyzed to determine the jurisdiction, and when that is done it is apparent that the court has the power to do the thing asked, by virtue of the provisions of the statute. The County Court as well as the Circuit Court, properly exercised that power, and the order of the Circuit Court will therefore be affirmed.

105 52
a208s 136

Daniel Watson v. Christian Fagner.

1. VERDICTS—*Where Reviewing Courts Will Not Disturb.*—Where the evidence of either side, standing alone, would support a verdict for the side to which it might be returned, a reviewing court will not disturb the verdict that was returned, on the sole ground that it is not supported by the evidence.

2. BANKS AND BANKING—*Banker Must Use Ordinary Care in Making Loans.*—A banker must use ordinary care in making loans and collections.

Assumpsit.—Appeal from the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge presiding. Heard in this Court at the May term, 1902. Affirmed. Opinion filed November 1, 1902.

H. M. STEELY and J. B. MANN, attorneys for appellant.

PENWELL & LINDLEY and C. M. BRIGGS, attorneys for appellee.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

This suit was before us on a former appeal, 99 Ill. App. 364, and the judgment was then reversed and the cause remanded for errors of instructions. The suit is by the appellee against the appellant for negligence as a banker in making loans for appellee to irresponsible persons and for failure to use ordinary care to collect such loans, whereby appellee lost the money so lent.

The second trial resulted in a verdict and judgment against appellant for $4,144.50, and after a remittitur of $373.80 had been entered, the court overruled appellant's motion for a new trial, and gave judgment against him for $3,770.70, to reverse which, this appeal is prosecuted, and various errors have been assigned and argued to effect the reversal, among which are, chiefly, the rulings upon the evidence and the instructions to the jury, and that the verdict is against the law and the evidence of the case.

We have examined the complaints about the ruling of the court upon the evidence but find no prejudicial error in that respect. Numerous complaints are made of the

instructions, both given and refused, but upon examination of the points made in this regard we are satisfied that the law was clearly and fully stated in the instructions given by the court, and when the entire charge is read as a whole, including those given by the court of its own motion, there is no ground upon which appellant can justly complain. Every material point in the case was covered as completely and correctly as appellant's rights demanded and nothing proper in the refused instructions was omitted from such as were given by the court. There is conflict in the evidence upon the point whether or not appellant loaned the money of appellee upon the direction of appellee to the parties in question, who were clearly irresponsible, or upon the judgment of appellant alone, and also whether appellant was charged with the duty of making collections, or whether appellee had taken that duty out of his hands, and relieved appellant of that responsibility. These were questions of fact to be settled by the jury in view of the contrarious character of the evidence of the respective parties. The jury might have found either way upon all these questions, and the verdict will not be disturbed. Where the evidence of either side, standing alone, would support a verdict for the side to which it might be returned, it has often been said a reviewing court will not disturb the verdict that was returned, on the sole ground that it is not supported by the evidence.

The jury, then, having found by their general verdict that appellant was guilty of the negligence charged—that it was he that made the loan upon his own judgment, to irresponsible persons, so that the money was lost and that he was charged with the collection of the same, and appellant having failed to use ordinary care in those respects, which by the law was his duty as a banker (Watson v. Roth, 191 Ill. 382), it follows that the verdict is supported both by the law and the evidence.

In Watson v. Roth, 91 Ill. App. 111, we held upon similar evidence contained in the present record, that a loan made to the same persons to whom it was made in this case, could

not be justified, and that appellant in the exercise of ordinary care as a banker must be held, from the evidence, to have known the loan was precarious and an unsafe one to make. The reasoning upon the facts in that case apply with equal force to this.

Finding no error in the record and proceedings of the Circuit Court, its judgment will be affirmed.

---

105 54
113 *185

Baltimore & Ohio S. W. Railroad Co. v. William Ross.

1. COMMON CARRIERS—*Have a Right to Restrict Liability.*—Railroad companies have a right to restrict their liability as a common carrier, by such contracts as may be agreed upon specially, they still remaining liable for gross negligence or willful misfeasance against which morals and public policy forbid that they be permitted to stipulate.

2. SAME—*Have a Right to Limit Time for Presenting Claims.*—A stipulation limiting the time in which claims for damages may be presented is binding upon the shipper when voluntarily and understandingly entered into by him, as the manifest object of such a provision is to force those claiming to be damaged by the carrier's negligence to promptly present their claims for adjustment while the facts and circumstances upon which they are based are fresh in the memories of the parties and witnesses, and to prevent the company from being harassed or imposed upon by dishonest claimants.

3. PRACTICE—*Contract Limiting Liability of Common Carrier Need Not be Specially Pleaded as a Defense in an Action for Damages.*—In an action for damages caused by injury to stock by delay of a common carrier, a contract limiting the carrier's liability may be introduced in defense under the general issue and need not be specially pleaded.

Trespass on the Case, for damages to stock. Appeal from the Circuit Court of Cass County; the Hon. THOMAS N. MEHAN, Judge presiding. Heard in this court at the May term, 1902. Reversed and remanded. Opinion filed November 1, 1902.

HENRY PHILLIPS and KRAMER, CREIGHTON & SHAEFFER, attorneys for appellant; EDWARD BARTON, of counsel.

MILLS & CLIFFORD, attorneys for appellee.

MR. JUSTICE BURROUGHS delivered the opinion of the court.

On September 18, 1901, the appellee, William Ross, sued the appellant, Baltimore & Ohio South Western Railroad Company, in the Circuit Court of Cass County, in an action on the case to recover damages alleged to have been sustained by him on account of injuries inflicted upon twenty fat cattle which he shipped on December 11, 1900, from Philadelphia Station, on the line of its road in said county, to Union Stock Yards in Chicago, Illinois, by reason of the negligent manner that the car in which the cattle were carried, was handled while being drawn from the station to the Stock Yards, and the loss of sixty cents per one hundred pounds, the difference in the market price of the cattle when sold, from what it was when they should have been sold but for the unnecessary and unreasonable length of time consumed in transporting them from the point of receipt to their destination.

The trial of the case by jury resulted in a verdict in favor of the appellee for $110 damages.

The appellant, having moved for a new trial and its motion being denied, excepted, has brought the case to this court by appeal, and to effect a reversal of the judgment, argues for error that the court refused to admit proper and material evidence offered by it, refused a proper instruction requested by it, gave improper instructions at the request of the appellee, and improperly refused its motion for a new trial when the verdict and judgment were not supported by the evidence and the law applicable thereto.

The declaration charged that on December 11, 1900, the appellant was a common carrier of livestock for hire, and on that day received from appellee at its station in Philadelphia, Cass county, Illinois, twenty fat cattle, which it agreed to safely and promptly carry from there to the Union Stock Yards, Chicago, Illinois, but failed to do so in this, that the car in which the cattle were carried from place received to destination, was so carelessly, negligently and slowly handled on the way, that the cattle were

thereby greatly jaded and reduced in size, and their market price reduced sixty cents per one hundred pounds, which necessarily occasioned appellee to lose a large sum of money on the sale of the cattle at said yards, to wit, $200.

The appellant pleaded the general issue only, upon which issue was joined.

The evidence disclosed that the appellee delivered the cattle to the appellant and it received them at the time, place and for the purpose charged in the declaration, and that they were delivered and received under a special shipping contract in writing, executed at the time by both the appellee and the appellant, and contained, among other provisions, the following:

That in consideration of the appellant agreeing to haul the cattle at a reduced rate and to furnish free transportation to the appellee from Philadelphia, Illinois, to Chicago, Illinois, the appellee was at his sole risk and expense to load and take care of, and to feed and water the cattle while being transported, whether delayed in transit or otherwise.

That the appellant or any connecting carrier should not be liable for or on account of any injury sustained by the cattle for delay occasioned from causes beyond their control.

That in the event of any unusual delay or detention of the cattle shipped, caused by the appellant or any of its connecting carriers, that the appellee would accept, as full compensation for all loss or damages sustained thereby, the amount actually expended in the purchase of food and water for the cattle while so delayed.

And that no claim for damages which might accrue to the appellee under this contract, should be allowed or paid by the appellant or sued for in any court by the appellee, unless a claim for such loss or damage should be made in writing, verified by the affidavit of the appellee or his agent, and delivered to the general freight agent of the appellant, at his office in the city of Cincinnati, Ohio, within five days from the time the cattle were removed

from the car in which they were shipped; and that if any loss or damage occurred upon the line of a connecting carrier, that such carrier should not be liable unless a claim should be made in like manner and delivered in like manner to some proper officer or agent of the carrier on whose line the loss or injury occurred.

And it further appears that the cattle were loaded in time to be taken from Philadelphia to Springfield, Illinois, and to make connection there with either of two evening fast freight trains of the Illinois Central Railroad Company, which, under ordinary circumstances, would get them to the Union Stock Yards in Chicago, Illinois, between six and seven o'clock the next morning.

Philadelphia is on the line of appellant's railroad, about twenty-six miles west of Springfield, Illinois. Pleasant Plains is also on appellant's railroad about nine miles east of Philadelphia. Owing to a long and severe drought which had existed in the locality from which the cattle were shipped and to which they were to be taken, water was very scarce at this time, and when appellant's train, on which they were being transported, reached Pleasant Plains, the water for the locomotive pulling the train was so low that more must be gotten for it; and it being impossible to get it there, the train was left at that place until the locomotive went to Springfield, got water and returned for it. By reason of this delay and the length of time consumed in switching after the train arrived at Springfield, the car in which the cattle were, was not delivered to the Illinois Central Railroad Company there until about ten o'clock at night of the day the cattle were received, which was after the two fast freight trains for that evening on that railroad, which usually arrived in Chicago between six and seven o'clock the next morning, were gone. The cattle were taken by the Illinois Central on an ordinary freight train which left Springfield about eleven o'clock the same night the cattle were received, and it did not get them to the Union Stock Yards in Chicago until about midnight of the succeeding night, when they were unloaded

and sold on the market there the next day. This train, because of its being an ordinary freight, did considerable switching on the way and frequently sidetracked and waited a considerable time for other trains to pass it; the effect of all of which was to jade and fatigue the cattle so that they lost considerable in weight. The market price of the cattle at the Union Stock Yards was considerable lower December 13, 1900, the day the cattle had to be sold, than it was on the preceding day when they should have been sold but for the delay aforesaid.

There is no evidence but that the special written contract under which the cattle were shipped was fairly and understandingly entered into by the appellee and the appellant, and it was put in evidence by each of them without objection.

Appellee was transported on the same train with the cattle from Philadelphia, Illinois, to Chicago, Illinois, free of charge; and he did not show or offer to show that he or any one for him had made a verified claim in writing upon any agent of the appellee or of the Illinois Central Railroad Company for any damages which he had sustained on account of the delay in transporting the cattle or the negligent manner in which they were handled on the journey at any time before he began this suit.

Over the objection and exception of the appellant, the court instructed the jury that "if the plaintiff delivered to the defendant a car load of fat cattle for shipment to Chicago on the 11th day of December, 1900, and that in the regular course of its business it should have delivered said car of cattle by its connecting lines into market in Chicago in time for the market on the 12th day of December, and if by the fault and negligence of the defendant the cattle were delayed in transit and not delivered by the defendant to its connecting lines in time for its regular daily freight train for Chicago, and in consequence thereof said cattle were not delivered at the Union Stock Yards until the 13th, then the defendant is liable to the plaintiff for such damages as the evidence shows he has sustained in consequence of the negligence of the defendant."

And upon objection of the appellee, and an exception of the appellant, the court refused to give the following instruction for the appellant:

"If the jury find from the evidence that when the plaintiff shipped his cattle he entered into a contract with the defendant for the shipment of such cattle to Chicago, and in such contract agreed that no claim for damages growing out of such shipment should be sued for unless a claim for such damages were first made in writing, verified by affidavit, and delivered to the general freight agent of the defendant at Cincinnati, within five days from the time the cattle were removed from the car, and if you further find that the plaintiff did not make such demand in writing, verified by affidavit, and deliver it to the said freight agent, before commencing this suit, then the plaintiff can not maintain this suit, and your verdict should be for the defendant."

The contention of counsel for the appellant is that the evidence fails to show that the appellant or its connecting carrier was guilty of any such negligence in transporting the cattle as renders it liable to the appellee for anything, but if it did, then under the terms of the shipping contract, the appellee is limited to recovering merely the amount he incurred for feeding and watering the cattle on the journey, upon his making claim therefor in accordance with the express terms of the contract, which he failed to make, and therefore he can not recover in this case.

While the counsel for the appellee, in support of the judgment, insists that under the evidence the appellant was grossly negligent in transporting the cattle, against which it can not relieve itself by the terms of the shipping contract, and that if it could, it is not entitled to the benefits thereof in this action for the reason it did not specially plead them, and that the provisions of the shipping contract can not be availed of by the appellant as a defense to this action under the general issue.

The declaration does not charge that the appellant willfully delayed the cattle or willfully injured them while transporting them, nor any such acts of negligence as manifest a reckless disregard of the rights of others or would

be equivalent to willful negligence, and therefore the appellee will not be heard to insist that he is entitled to have the jury find or the court hold that the appellant was guilty of gross negligence in this case, if for no other reason than that he has not charged it in his pleadings.

In Illinois Central R. R. Co. v. Morrison, 19 Ill. 136, it was held that "railroad companies have a right to restrict their liability as a common carrier, by such contracts as may be agreed upon specially, they still remaining liable for gross negligence or willful misfeasance, against which good morals and public policy forbid that they be permitted to stipulate;" which was approved in same company v. Read, 37 Ill., where, at page 510, the above language used in the Morrison case is quoted and approved, and that doctrine is sustained in Field v. C. & R. I. R. R. Co., 71 Ill. 458, and in Arnold v. I. C. R. R. Co., 83 Ill. 273.

In C. & N. W. R. R. Co. v. Chapman, 133 Ill., at p. 104 of the opinion, it is said:

"The act in respect of common carriers, approved March 27, 1874, provides that 'whenever any property is received by a common carrier to be transported from one place to another within or without this state, it shall not be lawful for such carrier to limit its common-law liability safely to deliver such property at the place to which the same is to be transported, by any stipulation or limitation expressed in the receipt given for such property.' This is substantially re-enacted in Sec. 33 of Chap. 114, relating to railroads. These statutes do not, in terms, prohibit common carriers from limiting their common-law liabilities by contract with the owner of property delivered for transportation."

We think, therefore, that the special contract under which the cattle were shipped, was a valid and binding obligation upon the appellee in this case, at least to the extent of its provisions.

That in the event of any unusual delays or detention of said livestock, caused by the negligence of said carrier or its employes, or its connecting carriers or their employes, or otherwise, the said shipper agrees to accept, as full compensation for all loss or damage sustained

thereby, the amount actually expended by said shipper in the purchase of food or water for the said stock while so detained; that no claim for damages which may accrue to the said shipper under this contract shall be allowed or paid by the said carrier, or sued for in any court by the said shipper, unless a claim for such loss or damages shall be made in writing, verified by the affidavit of said shipper or his agent, and delivered to the general freight agent of the said carrier at his office in the city of Cincinnati, Ohio, within five days from the time said stock is removed from said car or cars, and that if any loss or damage occurs upon the line of a connecting carrier, then such carrier shall not be liable unless a claim shall be made in like manner and delivered in like time to some proper officer or agent of the carrier on whose line the loss or injury occurred. Black v. Wabash, St. Louis & Pacific Ry. Co., 111 Ill. 351, and Cleveland, C., C. & St. L. Ry. Co. v. Newlin, 74 Ill. App. 638.

The reason for holding a stipulation like this when voluntarily and understandingly entered into by the shipper as binding upon him, is well stated in the Black case, *supra*, to be that "the manifest object of such a provision is to force those claiming to be damaged by the carrier's negligence to promptly present their claims for adjustment while the facts and circumstances upon which they are based are fresh in the memories of the parties and witnesses, and to prevent being harassed or imposed upon by dishonest claimants. We see nothing improper in requiring such claims to be verified by affidavit."

The insistence of the counsel for the appellee that the court properly refused to permit the appellant to prove that no verified claim was ever made upon any agent, either of the appellant or of its connecting carrier, for the reason that the special shipping contract was not specially pleaded, and its provisions could not be shown in this case under the general issue, is without force, for the reason that the action being case, and both the appellee and the appellant having introduced the contract in evidence, and each

treated it as proper evidence in the case, as they should, that provision was available as a defense to this action, under the general issue, without having been specially pleaded. Wabash, St. L. and P. Ry. Co. v. Black, 11 Ill. App. 465, and Coles & Co. v. L. E. & St. L. R. R. Co., 41 Ill. App. 607.

It is not claimed that there was any verified claim, in writing, made upon the general freight agent of the appellant by the appellee or any one for him, for the damages claimed to have been sustained by him and growing out of the shipment of the cattle, at any time before this suit was commenced, as is provided by the terms of the contract, and therefore the court erroneously refused to permit the appellee to prove that fact as a defense under the pleadings; and as the appellee had failed to prove that he had made such claims, it was improper for the court to give, at his request, the instruction first above quoted, and to refuse to give the instruction second above quoted, as requested by counsel for appellant.

For the errors above indicated, we will reverse the judgment of the Circuit Court in this case and remand it to that court for such further proceedings as to law and justice appertain.

A. N. Kellogg Newspaper Co. v. Corn Belt National Building and Loan Association et al.

1. FREEHOLD—*When It Is Involved.*—When a suit is prosecuted to a final determination, and will, by virtue of the judgment or decree, result in one gaining and the other losing an estate, a freehold is involved.

2. SAME—*Where It Is Involved in Foreclosure Proceedings—Homestead.*—Although ordinarily a freehold is not involved in a foreclosure proceeding, still, if by the defense in the case the homestead is put directly in issue, and the decree awards it, and the assignment of errors in this court also puts it directly in issue, a freehold is involved.

Bill to Foreclose a Mortgage.—Appeal from the Circuit Court of Douglas County; the Hon. WILLIAM G. COCHRAN, Judge presiding.

Heard in this court at the May term, 1902. Dismissed. Opinion filed November 1, 1902.

THORNTON & CHANCELLOR, attorneys for appellant.

ECKHART & MOORE, attorneys for appellees.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

This was a bill in equity by the appellee Corn Belt National Building and Loan Association, to foreclose a mortgage given by the appellees Richmond, husband and wife, for $2,000, the appellant having been made a party in consequence of its interest as a judgment creditor of Samuel A. Richmond. Appellant answered the bill, showing its judgment against Samuel A. Richmond for $16,943.50, junior to the mortgage; a sale of the premises was had under the execution upon the judgment, previous to which it had paid to appellee Sarah A. Richmond $1,000 in lieu of homestead, the premises not being divisible. Sarah A. Richmond answered the bill, in which she set up a claim for homestead in the premises, and upon the hearing the court gave its decree of foreclosure, directing a sale of the premises, "subject to the estate in fee, worth $1,000, owned by Sarah E. Richmond," and from this decree appellant has appealed to this court, and to effect a reversal thereof has argued in this court, that the findings and decree of the trial court upon the claim of Sarah E. Richmond to an estate or right of homestead in the premises, and the value thereof, is erroneous.

Appellee Sarah E. Richmond has moved this court to dismiss the appeal herein, for the want of jurisdiction, because a freehold is involved. In Stodalka v. Novotny, 144 Ill. 125, a homestead was involved, a motion to dismiss the appeal was entered, but the court overruled it, holding that the estate of homestead was a freehold. A bill by a widow and heirs of a deceased owner of land, against a purchaser under a decree of foreclosure, seeking to establish and set off to them a homestead in the land, was held

to involve a freehold, and an appeal would lie from the final decree directly to the Supreme Court, and a motion to dismiss the appeal was overruled in Snell v. Snell, 123 Ill. 403.

When the suit is prosecuted to a final determination, and will by virtue of the judgment or decree, result in one gaining and the other losing the estate, a freehold is involved. C., B. & Q. R. R. Co. v. Watson, 105 Ill. 217; Van Meter v. Thomas, 153 Ill. 65. Also the reasoning of the court in Franklin v. Loan & Invest. Co., 152 Ill. 345, and cases cited, is applicable to the point here, that a freehold is involved, and is to the effect that, although the suit was for a foreclosure, where, according to the decisions, a freehold is not involved, still if by the defense in the case the homestead is put directly in issue, and the decree awards it, and the assignment of errors in this court also puts it directly in issue, a freehold is involved. The decree in the present case gives to Sarah A. Richmond an estate of homestead. It is from that part of the decree the appeal is taken and prosecuted in this court. The assignment of error puts the right to a homestead directly in issue. Were we to enter upon the decision of the case on its merits, we would be compelled to say that appellee was or was not entitled to such estate, and in that case she would either gain or lose a freehold by the decision of this court. This is clear by the authorities we have cited. A freehold is therefore directly involved. This court has no jurisdiction in such a case. The motion to dismiss the appeal will therefore be sustained, and the appeal will be dismissed with leave to appellant to withdraw the record, abstracts and briefs, if it shall be so advised.

John Gerhards v. Ben Johnson.

1. APPELLATE COURT PRACTICE—*Must Review Correctness of Instructions Notwithstanding No Motion for a New Trial Appears in Bill of Exceptions.*—It is the duty of the Appellate Court to review the correctness of instructions given for the plaintiff on the trial, as well as the correctness of the ruling of the court in refusing instructions asked for the defendant, notwithstanding no motion for a new trial appears in the bill of exceptions.

2. DEDICATION—*A Question of Fact.*—Whether a strip of land along a highway has been dedicated to the public for a part of the road is a question of fact for the jury.

Trespass, to real estate. Appeal from the Circuit Court of Montgomery County; the Hon. TRUMAN E. AMES, Judge presiding. Heard in this court at the May term, 1902. Reversed and remanded. Opinion filed November 1, 1902.

W. M. TODD, and ZINK, JETT & KINDER, attorneys for appellant.

LANE & COOPER, attorneys for appellee.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

Appellant sued appellee before a justice of the peace for trespass to real estate, and the case having been taken to the Circuit Court by appeal, the trial by jury there was ended by the direction of the court, contained in an instruction given at his instance, to find for the defendant, to which action of the court plaintiff excepted. The court gave judgment upon the verdict against appellant in bar of the action and to reverse the judgment this appeal is brought and such action of the court, in so directing the verdict, is argued to effect such reversal.

The bill of exceptions contains no motion for a new trial, nor exception to the overruling of such motion, and for this reason counsel for appellee insist that no question is properly presented to this court for its decision. Appellant's counsel, in their reply brief, rely only upon the instruction of the court to find the verdict and the rulings of the court

upon the admission of evidence, and insist this court may consider these questions without a motion for a new trial having been made in the trial court, and cite I. C. R. R. Co. v. O'Keefe, 154 Ill. 508, to sustain their contention. It was held in that case that it was the duty of the Appellate Court to review the correctness of instructions given for the plaintiff on the trial, as well as the correctness of the ruling of the court in refusing instructions asked for the defendant, notwithstanding no motion for a new trial appeared in the bill of exceptions, and reversed its judgment because it did not. Under this authority we may, at least, consider the propriety of the instruction of the court to find their verdict for the defendant.

Appellant owned land adjoining to a public road, and, as he testified, he set out a hedge upon his land eight feet and eight inches from the line of the highway in order that he might have room to trim it without encroaching upon the road. Appellee, as one of the highway authorities, excavated some of the earth upon the strip, claiming it as part of the highway, and that it had been dedicated to the public, to which appellant objected at the time. Appellee introduced no evidence, and at the close of the plaintiff's evidence the court directed the verdict as previously said.

Whether the strip of land was a part of the highway, whether it had been dedicated to the public for a part of the road, and whether plaintiff was in the possession thereof when the suit was brought, were all questions of fact for the determination of the jury, under proper instructions. In the determination of a question of fact, the citation of numerous authorities, as has been done in this case by the counsel, affords little assistance to the court, and it would be useless for us to endeavor to review them, for they could have no application to the question we have decided.

In our opinion, the evidence should have been submitted to the jury for their own verdict, and it was prejudicial error for the court to direct the verdict as it did, and for this the judgment will be reversed and the cause remanded.

The Cleveland, Cincinnati, Chicago and St. Louis R. R. Co. v. Robert J. Hornsby.

105 67
a202s 138

1. RAILROADS — *Fact that Fire is Communicated by Locomotive Makes a Prima Facie Case of Negligence.*—Where a person suffers loss by fire communicated by a locomotive engine passing along any railroad in this state, the fact that such fire was so communicated shall be taken as full *prima facie* evidence to charge with negligence the railroad company operating the engine.

2. SAME—*Burden is upon Company to Show Due Care.*—In a suit based upon the above statutory provision, the burden is upon the railroad company to avoid the effect of such assumed negligence by proving that the engine was at the time equipped with the best and most approved appliances to prevent the escape of fire, that the same were in good repair and that they were carefully and properly managed.

Trespass on the Case, for damages from fire set by locomotive. Appeal from the Circuit Court of Macoupin county; the Hon. ROBERT B. SHIRLEY, Judge presiding. Heard in this court at the May term, 1902. Affirmed. Opinion filed November 1, 1902.

GEORGE F. MCNULTY and JOHN E. HOGAN, attorneys for appellant.

DAVID E. KEEFE and H. R. BUDD, attorneys for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

Appellee is the owner of a farm in Macoupin county through which appellant's railroad passes. On the 2d of August, 1901, flying sparks from a freight locomotive started a fire in some stubble land of appellee at a point about twelve feet from the right of way, and before the fire could be extinguished, it destroyed five wheat stacks, containing about 800 bushels of wheat, a stack of oats, a large amount of fence and a number of fruit trees. In a suit for damages, appellee recovered a judgment against appellant for $1,390.

Where a person suffers loss by fire communicated by a locomotive engine passing along any railroad in this state, the fact that such fire was so communicated shall be taken as full *prima facie* evidence to charge with negligence the

railroad company operating the engine. Sec. 103, Chap. 114, Hurd's Illinois Revised Statutes. In a suit based upon that statutory provision, the burden is on the railroad company to avoid the effect of such presumed negligence by proving that the engine was at the time equipped with the best and most approved appliances to prevent the escape of fire, that the same was in good repair and that the same was carefully and properly managed. In other words, the plaintiff is entitled to recover when he establishes the fact that his property was destroyed or injured by a fire so communicated, unless the defendant shall affirmatively show that the engine was equipped with the most effective appliances to prevent the escape of sparks, that they were in good repair and that the engine was carefully and skillfully managed by a competent engineer. C. & A. R. R. Co. v. Quaintance, 58 Ill. 389; T. W. & W. R. R. Co. v. Larmon, 67 Ill. 68; C. & E. I. R. R. Co. v Goyette, 133 Ill. 21; American Strawboard Co. v. C. & A. R. R. Co., 177 Ill. 513.

In this case, the evidence clearly shows that the engine was handled by a competent engineer. The frictional questions upon the trial were, whether the engine which caused the fire was equipped with the best and most approved appliances to prevent the escape of sparks, and whether such appliances were in good repair at the time of the fire. Both those questions were answered in the negative by the jury in response to special interrogatories. It is urged that the jury erroneously so answered, and that contention is relied upon for reversal of the judgment. The foreman of appellant's boiler shops at Mattoon, D. W. Sapp, testified that the spark arrester on the engine in question was of the best and most approved pattern for the arrest of sparks, and displayed in court a sample of wire netting like that used on the engine. James E. Ross, an engineer of over thirty years' experience, testified in rebuttal that the arrester was not the best, that the mesh of the sample which was exhibited was too coarse and that an engine would clean itself with such an arrester. It was the peculiar province of the jury to decide in the difference

between these two experts, and we are inclined to the view that they decided it properly.

In support of a motion for a new trial, affidavits corroborating the contention of Sapp and contradicting Ross were presented to the court. The trial court properly refused to hold them sufficient as ground for new trial, for the reason that they were merely cumulative.

It was contended upon the trial and is contended here that the inspection of the spark arrester made before and after the fire was superficial and not such as to justify a finding that it was in good repair. In view of the fact that we think the jury decided the other question correctly, it is unnecessary to express our views as to the inspection.

The jury were correctly instructed, the damages were not excessive, and the judgment will be affirmed.

The Cleveland, Cincinnati, Chicago & St. Louis R. R. Co. v. Naomi F. David.

1. NEGLIGENCE—*Sounding Whistle While Passing under an Overhead Bridge upon Which a Buggy is Passing.*—It is culpable negligence for an engineer to sound a locomotive whistle while passing under an overhead bridge upon which he sees a buggy crossing.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Edgar County; the Hon. HENRY VAN SELLAR, Judge presiding. Heard in this court at the May term, 1902. Affirmed. Opinion filed November 1, 1902.

GEORGE F. MCNULTY, C. S. CONGER and R. L. MCKINLAY, attorneys for appellant.

H. S. TANNER and F. W. DUNDAS, attorneys for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

Appellee brought this suit against appellant to recover damages for injuries sustained by her in being thrown from her buggy, after her horse, which she was driving over an

overhead bridge, had become frightened at one of appellant's moving engines. The negligence charged in the declaration was failure on the part of appellant's servants operating the engine to give proper notice or signal of the approach of the engine whereby appellee could have avoided driving upon the bridge until the engine had passed, and the driving of the engine with great speed and with loud and startling noises under the bridge, whereby her horse became frightened and ran away. A trial by jury resulted in a verdict and judgment in her favor for $1,000.

While some complaint is made on the score of erroneous instructions and admission of improper evidence, counsel for appellant urge chiefly, as grounds for reversal, that appellant was guilty of no negligence in the management of its engine, and that appellee was not in the exercise of proper care for her own safety when injured.

At the place in question, appellant's railroad runs east and west. The overhead wagon bridge which spans it is seventy-six feet long, seventeen feet wide and twenty-four feet above the rails of the track, and passes over the track at right angles. On the day appellee was injured, she was driving a single horse attached to a buggy. The evidence shows that a passenger train going east passed a few minutes before she reached the bridge. That train was followed by a freight train. Supposing the way was clear, appellee drove upon the bridge and did not discover until about half way over, that an engine, with a caboose attached, was coming from the west, following the other two trains. It was then close to the bridge and moving rapidly. She testified that it came with but little noise until just as it reached the bridge, when, and while passing under it, the whistle suddenly sounded and steam escaped, making such noise as to frighten her horse and cause him to run away. In the runaway, the buggy was upset and she was thrown out, receiving thereby very serious injuries. She is corroborated by a witness named Wilkin, who was riding in a wagon about 300 feet behind her. Wilkin testified that he heard no warning of the engine's approach by bell or whis-

tle until it reached the bridge, and that the whistle sounded just as the engine reached the bridge and while under it. Both the engineer and fireman admitted that the appellee was in plain view while crossing the bridge, and that they saw her when 250 feet away. They denied, however, that the whistle sounded either just before reaching the bridge or while passing under it. This, we regard as the vital frictional point in the case. If the engineer, after seeing this old lady driving along the bridge, sounded his whistle when his engine was under her, as testified by appellee and Wilkin, his conduct was grossly culpable. He must have known from his experience, as well as from common sense, that the sharp blasts of an engine whistle directly under a horse passing over an overhead bridge would have the effect of frightening the horse aud rendering it unmanageable. It is true there was a whistling post about two hundred feet east of the bridge, and that at this post it was his duty to begin a statutory signal for the next grade crossing. But the testimony of appellee and Wilkin shows that he did not wait until the post was reached, and the jury evidently believed them. In the conflict upon this point, it was the peculiar province of the jury to find the truth.

We are unable to see wherein appellee failed to exercise the care of an ordinarily prudent person. Appellant's road was a single track road. The point in question was two miles from a station. She had just seen two trains pass, one following closely behind the other, when she reached the bridge approach. Hearing no other train, she was justified in supposing that no other would come until she had passed over. From the peculiar conditions surrounding the approach, her view of the track was obstructed until she was well on the bridge. And it was not until she was well on the bridge that she knew of the presence of the engine. All she could then do was to keep her horse quiet and under control until the engine passed. Because of the age of the horse and his gentle disposition, this she could have done, doubtless, had it not been for the sharp blasts of the whistle, which the engineer recklessly sounded immediately before reaching and while under the bridge.

We do not care to discuss the question as to whether the conditions were such as to make the duty of appellant's engineers to give warning of a train's approaching this overhead bridge, or the conflict in the testimony as to whether such warning was given in this case. Independent of appellant's duty in that regard, we think that the culpable act of the engineer in sounding the whistle at the bridge, after seeing appellee with her horse drive over, fixed the liability of the company.

No error was committed by the trial court in ruling upon evidence. Appellee only asked for three instructions and while the first one is open to some criticism, we are unable to see how it could have produced any harmful effect upon the jury, in view of the liberal instructions given for appellant and the fact that the negligence which rendered appellant liable was the act of the engineer after reaching the bridge.

As to the contention of appellant that the trial court erred in refusing one of its instructions offered, it is sufficient for us to say that the court gave in behalf of appellant twenty-eight instructions—certainly enough in number to cover every conceivable point in this case, or any other. We see no reversible error in the record and we think that substantial justice has been done.

Judgment affirmed.

John Loftus et al. v. Stella Hamilton, by Her Next Friend.

105 72
f105 75

1. DRAM-SHOPS—*Keeper Liable to Child Deprived of Support through Liquors Sold to the Father.*—A child dependent for support on a father who commits a crime while intoxicated has a cause of action against the dram-shop keeper who furnished the liquor, provided the intoxication be the efficient cause of the crime, and a conviction for the crime deprives the child of its means of support. The vital question in such a case is, did the intoxication cause the man to commit the crime? If it did then the dram-shop keeper is liable, whether the child was

deprived of its means of support by conviction of the father and his incarceration in the penitentiary or by his flight from the country to avoid that punishment.

Prosecution Under the Dram-Shop Act.—Appeal from the Circuit Court of Champaign County; the Hon. FRANCIS M. WRIGHT, Judge presiding. Heard in this court at the May term, 1902. Affirmed. Opinion filed November 1, 1902.

ROYAL WRIGHT and S. PHILBRICK, attorneys for appellants.

JOHN J. REA and T. J. SMITH, attorneys for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

Appellee, a girl twelve years of age, brought this suit, by next friend, against appellants, saloonkeepers at Champaign, Illinois, to recover for injury to her person and means of support caused by the intoxication of her father from liquor sold to him by appellants. There was a trial by jury resulting in a verdict and judgment in her favor for $50.

The evidence shows that appellee's father, William Hamilton, was a railroad section foreman and when sober was capable of earning and did earn $60 per month. He was the only means of support for appellee and two other small children. For a year or two prior to the 11th of November, 1899, he was frequently seen about the saloons of appellants and frequently became intoxicated. While in that condition he squandered his money and abused and beat his children. While in a state of intoxication on that day he made a criminal assault upon a young lady of Champaign, whereupon, to avoid criminal prosecution or through fear of violence, he left home and has remained away ever since. He has not been seen or heard from since then by any member of his family.

Appellants denied selling Hamilton any liquor whatever, and in corroboration of their testimony introduced winesses who stated that they had seen Hamilton refused liquor at the bars of appellants. It is also contended by them that Hamilton's leaving home and withdrawing support from appellee was not due to his intoxication but

because he had committed a crime of which he desired to avoid prosecution. Those two points of contention are vigorously urged here as ground for reversal. With reference to the first point, it is sufficient to state that there was evidence abundant to support a finding that Hamilton procured liquor at the saloons of appellants and did so frequently within two years prior to his departure. Not only did witnesses testify to seeing him procure liquor at both places but he was frequently seen "hanging about" there. Men in the habit of becoming intoxicated frequent places where they may procure liquor—not places where it is denied them.

Independent of the fact that Hamilton, by reason of his intoxication, committed a crime and absconded, thereby withdrawing support from appellee, the evidence shows that she was injured, not only in her means of support, but in her person by the brutal acts of her father while drunk, far above the meager amount allowed by the jury. On one occasion he beat her with an ax handle, using such violence that a neighbor was compelled to interfere and take the child home with him. We do not wish to be understood as intimating that appellee is not entitled to damages for loss to her means of support occasioned by her father committing a crime while under the influence of liquor and fleeing the country. A child dependent for support on a father who commits a crime while intoxicated has a cause of action against the dram-shop keeper who furnished the liquor provided the intoxication be the efficient cause of the crime and a conviction for the crime deprives the child of its means of support. The vital question in such a case is, did the intoxication cause the man to commit the crime? If it did, then the dram-shop keeper is liable, whether the child was deprived of its means of support by conviction of the father and his incarceration in the penitentiary or by his flight from the country to avoid that punishment.

We see no error in the record, either in the rulings upon evidence or in instructions, of which appellants have a right

to complain. The only substantial error we see is the one committed by the jury in allowing appellee the paltry sum of fifty dollars damages.

Judgment affirmed.

Mr. Presiding Justice WRIGHT took no part.

John Loftus et al. v. Helen Hamilton, by Her Next Friend.

Same v. Ruby Hamilton, by Her Next Friend.

ROYAL WRIGHT and S. PHILBRICK, attorneys for appellants.

JOHN J. REA and T. J. SMITH, attorneys for appellee.

OPINION PER CURIAM.

These two cases are in all essential features like John Loftus and Amos Morfey v. Stella Hamilton, by her next friend, *ante*. They were tried with that cause by the same jury. Twenty dollars damages were allowed in each case. We affirm these cases for the reasons appearing in the opinion filed in the Stella Hamilton case.

Mr. Presiding Justice WRIGHT took no part.

Cleveland, Cincinnati, Chicago and St. L. Ry. Co. et al. v. John A. Hamilton.

1. PRACTICE—*Objection to Evidence Does Not Relate to Errors in Settling Pleadings.*—Where no error is assigned touching any action of the trial court in settling the pleadings, the sufficiency of the pleas can not be considered on an objection to evidence.

Trespass on the Case.—Damages by fire. Appeal from the Circuit Court of Champaign County; the Hon. FRANCIS M. WRIGHT, Judge presiding. Heard in this court at the May term, 1902. Affirmed. Opinion filed November 1, 1902.

GERE & PHILBRICK, attorneys for appellants.

RAY & DOBBINS and WALTER B. RILEY, attorneys for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

At the September term, 1901, of the Champaign County Circuit Court, appellee recovered a judgment against the appellant railroad company for $70 and costs. The railroad company took an appeal to the Supreme Court and in compliance with the order entered executed an appeal bond for $150, with appellant Glover as surety. The appeal was dismissed in the Supreme Court and at the March term, 1902, of the Circuit Court, this suit was commenced on the appeal bond, resulting in a judgment in favor of appellee for $150 debt and $71.46 damages.

This appeal is prosecuted to reverse the last named judgment on account of alleged errors of the trial court in sustaining a demurrer to a certain special plea, on account of improper evidence admitted and because of erroneous instructions. No error is assigned touching any action of the Circuit Court in settling the pleadings and for that reason the sufficiency of pleas is not considered by us. The objection to evidence relates to the judgment recovered in the Circuit Court and appealed from. Under the pleadings it was not necessary to introduce that judgment. It was recited in the appeal bond sued upon and appellants were estopped from questioning it. We see nothing wrong with the instructions.

Judgment affirmed.

Mr. Presiding Justice WRIGHT took no part.

George M. Custer et al. v. M. L. Harmon.

1. VENDOR AND VENDEE—*Where Vendee Relies upon Superior Knowledge of Vendor.*—Where the vendee is wholly ignorant of the value of the property, and the vendor knows this, and also knows that the vendee is relying upon his (the vendor's) representation as to value,

and such representation is not a mere expression of opinion but is made as a statement of fact, which statement the vendor knows to be untrue, such a statement is a representation by which the vendor is bound.

2. JUDGMENT BY CONFESSION—*May be Opened upon Application of any Defendant Having a Meritorious Defense.*—An application to open a judgment by confession is always addressed to the equitable as well as to the law powers of the court, and in the exercise of its equitable powers, the court may open it upon the application of any defendant having a meritorious defense to the cause of action upon which it was rendered, whether his co-defendants do or do not join him in such application.

Motion to Vacate a Judgment by Confession.—Appeal from the Circuit Court of Coles County: the Hon. HENRY VAN SELLAR, Judge presiding. Heard in this court at the May term, 1902. Reversed and remanded with directions. Opinion filed November 1, 1902.

JOHN S. HALL and CRAIG & KINZEL, attorneys for appellants.

BRYAN H. TIVNEN and JAMES F. HUGHES, attorneys for appellee.

MR. JUSTICE BURROUGHS delivered the opinion of the court.

On September 20, 1901, in vacation, after the April term, 1901, of the Circuit Court of Coles County, the clerk of that court, upon proper declaration, cognovit, power of attorney, and affidavit of execution, entered a judgment by confession for $1,604.71 in favor of the appellee, M. L. Harmon, and against the appellants, George M. Custer and Lucy C. Custer, together with G. E. Colson, John R. Hamilton and A. I. Rhue, upon their two promissory notes, and power of attorney in each to confess such judgment. An execution was issued upon the judgment and placed in the hands of the sheriff of said county to execute.

On the first day of the October term, 1901, of said court, the appellants moved the court to stay the execution, vacate the judgment and to grant them leave to plead to the action on the notes. Which motion was supported by an affidavit as follows:

"George M. Custer and Lucy C. Custer, being first duly sworn, upon oath say that they are the defendants in the

above entitled cause, and show to the court that they as principals, and G. F. Colson, John R. Hamilton and A. I. Rhue as their securities, signed two certain notes and warrants of attorney for the sum of eight hundred forty-three and seventy-five hundredths dollars ($843.75) each, both of said notes dated March 2, 1901, and one due on or before six months, and one due on or before twelve months, together with five per cent interest from the date thereof until paid, said notes being payable to ourselves and indorsed by affiants, G. E. Colson, John R. Hamilton and A. I. Rhue, and delivered to the plaintiff, M. L. Harmon.

Affiants further say that on or before the first day of March, 1901, the above named plaintiff, M. L. Harmon, being the owner and possessor of a certain stock of goods situated in the city of Mattoon, and being desirous of selling and disposing of the same to these affiants, entered into a certain written contract with these affiants in regard to the purchase thereof.

Affiants further say that the said written contract contained, among other things, an agreement that these affiants were to purchase said goods, and that the amount they were to pay for the same was the value of said goods and merchandise to be determined by the present worth of the various articles in said stock so sold to these affiants plus ten per cent to be added to the same for some of them and five per cent to be added to others for carriage, and that said merchandise should be invoiced (at the then) present worth, and that said plaintiff, M. L. Harmon, should furnish (the then) present value thereof, and in consideration these affiants were to have said goods and merchandise at the present worth, and relying upon the representations of the said M. L. Harmon that they would be so invoiced, these affiants agreed to convey to said plaintiff a certain tract of land in Wabash county, Illinois, for and in consideration of $————, and when said invoice was completed and the amount in value of the merchandise so ascertained, these affiants were to execute their notes to the said M. L. Harmon for the balance after deducting the value of the lands at the price heretofore agreed upon.

These affiants further say that the said M. L. Harmon had for many years prior to said time been engaged in the mercantile business and was a man well experienced in such business, and well knew the worth and price of each and every article which was to be invoiced to these affiants; and at the time of the invoice knew the present worth of said articles, and each and every one thereof, and what it

should have been invoiced as to these affiants according to said agreement.

These affiants further say that, relying upon the representations of the said M. L. Harmon that these affiants should have said goods (at the then) present worth, and that they were to be invoiced according to said representations, and delivered to these affiants at their present worth, these affiants entered into said written contract with the said M. L. Harmon for the purchase of said goods as aforesaid at their then present worth, and when said invoice was completed, conveyed to the said M. L. Harmon as a part of the consideration thereof said tract of land in Wabash county, Illinois, and executed their promissory notes as above stated, said notes being part of the amount due after the conveyance of said lands, and part secured by second mortgage on hotel, and the invoice of said goods on the valuation of said goods at the cost price as given by the said M. L. Harmon, and for no other consideration whatever.

Affiants further show to the court that they were not experienced in the mercantile business, and had no means of ascertaining what the present worth of the said various articles in said stock was, and that the said M. L. Harmon furnished to these affiants what he said was the cost price and present value of the various articles of goods, and upon said statements so made by the said M. L. Harmon and relied upon by these affiants said invoice was taken, and that the said M. L. Harmon then and there well knew that said statements as to the cost price and present value of the stock of goods so invoiced was not true, and was false and fraudulent, and was made by the said M. L. Harmon for the purpose of cheating and defrauding these affiants, and that these affiants did not know at the time that said invoice was completed and said notes executed; that the said statements and representations made by the said M. L. Harmon as to the present value and cost of said stock of goods was false and fraudulent.

These affiants further show that said contract provided that these affiants were to select one person to invoice, and the said plaintiff, M. L. Harmon, was to select another, and if they could not agree upon said invoice that they would select the third person.

Affiants further show to the court that they were induced and persuaded by the said M. L. Harmon to take the man selected by him as the only person to invoice the queensware in said stock of goods upon the representations that the said man was honest, competent and trustworthy, and

knew the prices and present value of the articles to be invoiced, and that these affiants relied upon the representations so made by the said M. L. Harmon in regard to said invoice, and the representations made by said Harmon and his agent who invoiced said stock of queensware for him.

Affiants further say that some time after they took possession of said stock of goods they ascertained that said representations made by the said M. L. Harmon, the plaintiff, and the person so selected by him to invoice said goods, was not true, and that a large number of said articles were invoiced at double the amount of the present worth of the same so listed, and on said invoice and calculations made thereon these defendants executed said notes in question, and that there is no other consideration for the execution of said notes except the invoice of said merchandise as aforesaid.

Affiants further say that they have ascertained from investigation and invoices and from interviews with parties from whom the said goods were purchased that all of said goods were invoiced to these affiants at from 5 to 100 per cent in excess of the present value at the time of said invoice, and that they expect to prove by the persons from whom said goods were purchased, the above and foregoing facts on a trial of said cause.

Affiants further say that the amount of the excess which was figured on the invoice of said stock and for which these notes were executed in excess of the present worth of the goods at the time of said sale and invoice, amounts to about fifteen hundred (1,500) dollars, and that these affiants have a just and meritorious defense to said notes for a failure of consideration to the extent of said fifteen hundred (1,500) dollars, or more.

Affiants further say that if they are permitted to file pleas to said suit and make a defense on the trial of said cause that they will swear to the above and foregoing statements and facts, and they expect to prove the same by the persons of whom the said M. L. Harmon, the plaintiff, bought the merchandise which was invoiced to them.

Affiants further say that on the 20th day of September, 1901, the said M. L. Harmon caused a judgment to be entered in the Circuit Court of Coles County by a confession against these affiants, and said G. F. Colson, John R. Hamilton and A. I. Rhue, for the sum of sixteen hundred four and seventy-one hundredths dollars ($1,604.71) and costs of suit, and on the same day caused an execution to be issued out of the clerk's office of said county on said

judgment so taken, and that said execution is now in the hands of the sheriff of Coles county.

These defendants show to the court that said judgment so taken by the plaintiff on the 20th day of September, 1901, was entered by the clerk of this court upon copies of the alleged notes executed, and not upon the original, reference being had to the files in said case, which is made a part of this affidavit; and affiants say that they have examined said files and that the signatures to said papers so on file are not the signatures of these affiants, or the said G. E. Colson, John R. Hamilton or A. I. Rhue.

Affiants further show that the said copy of said notes, or what purports to be a copy of said notes, is not a copy of the notes signed by these affiants.

Affiants further say that the notes signed by them and the other defendants in the above entitled cause contained no provisions for attorneys' fees; that that portion of the copy of said notes which reads as follows—'And 5% of the face of this note as attorneys' fees' was erased from the same, and is not part of the original notes.

Affiants further show that said judgment includes the sum of seventy-four and thirty-seven hundredths dollars ($74.37) for attorneys' fees, while said notes executed by these affiants and the other defendants contained no provision whatever for any attorneys' fees to be included in said judgment or otherwise.

These affiants therefore pray that said execution may be stayed, and that the judgment may be set aside, and that these affiants may be allowed to plead, and that this application is not made for delay, but that justice may be done."

The court allowed the motion and entered an order "that the execution be stayed, and that the judgment be opened to plead, saving the lien of the judgment for the benefit of any final judgment that may be recovered." After which, by leave of court, the appellee filed two additional counts to his declaration upon the two notes in question, and the appellants pleaded the general issue and a special plea. A demurrer was sustained to the special plea, and upon leave being given, it was amended the third time, when it read as follows:

"And for further plea in this behalf, the defendants say that the plaintiff ought not to have his aforesaid action

against them, the defendants, because they say that the several supposed causes of action in the said declaration mentioned are one and the same, to wit, the supposed cause of action in the said first count mentioned, and not different causes of action; that on, to wit, the second day of March, 1901, the plaintiff, being the owner and proprietor of a store containing a stock of queensware, dry goods and notions, in the city of Mattoon, county and state aforesaid, entered into a written contract with the defendants, by virtue of which contract said defendants were to purchase said merchandise of the plaintiff, the value thereof to be estimated by invoice thereof at the present worth, and the defendants were to convey to the plaintiff, as consideration of said purchase, a certain tract of land containing eighty-nine acres in Wabash county, Illinois, and when the invoice of said queensware, dry goods and notions was made at present worth, and the amount in value ascertained by said invoice, these defendants were to execute their notes to the plaintiff for the excess as ascertained by said invoice above the value of defendants' equity in said land, which equity was estimated at two thousand five hundred ten (2,510) dollars.

And these defendants aver that it was also provided in said contract that said stock of queensware, dry goods and notions should be invoiced at their then present worth, and ten per cent should be added to all queensware and lamps and goods on the west side of the room in which said goods were then contained, and that five per cent was to be added to all other goods, for carriage.

And these defendants aver that the said plaintiff was at that time and had for many years prior to said time been engaged in the mercantile business, and the purchase and sale of the articles which were sold and about to be invoiced, and had purchased said articles so sold to the defendants, and was experienced and knew the present worth of each and every article to be invoiced, and that these defendants were inexperienced in said business and did not know the present worth of said goods, and had no experience in said mercantile business or the purchase and sale of said goods; and that the said plaintiff knew that the said defendants were not experienced in said business and did not know the present worth of said goods about to be so invoiced.

And these defendants aver that it was also provided in said contract that the value of said stock of goods was to be estimated by invoice by disinterested persons, each party to select one person, and these two to select a third compe-

tent person in case they could not agree, and that said invoice was to be made at the then present worth of said merchandise.

And these defendants aver that the plaintiff represented to them that the plaintiff and the person so selected by the plaintiff knew the present worth of the said goods, and said person, together with the plaintiff, could and would make a true, correct and proper invoice of said goods at their then present worth, and in accordance to the terms of said contract.

And these defendants aver that they relied upon representations that the plaintiff and the persons so selected by the plaintiff knew the present worth of said goods to be so invoiced, and that they, together with plaintiff, could and would make a true, correct and proper invoice of said goods at their present worth, according to the terms of said contract, if accepted by defendants.

And the defendants aver that said representations made by the plaintiff that said person so selected by him to invoice said goods would make a true and correct invoice of said goods was false and known by him at the time he made them to be false and made with intent to prevent the defendants from selecting any person on their part to invoice said goods, so that said goods would be invoiced at a much greater value than their present value, which was unknown to the defendants at the time they consented thereto.

And the defendants aver that before said appraiser had been selected, the plaintiff and said appraiser conspired and agreed together that they would induce the defendants to accept an appraisement by them by representations that the plaintiff and the person so selected by him could and would make a true and proper and correct invoice of said goods, which representations were false and known to be false when made by plaintiff and said person so selected by him, but were relied upon by defendants, and when so accepted, conspired and agreed they would invoice said goods at a higher price than the price fixed in said contract, and so said plaintiff and said appraiser by collusion and with intent to perpetrate a fraud upon the defendants, induced them to accept said appraiser upon said false representations, and in pursuance of said collusion knowingly and purposely invoiced said stock to defendants at a price greatly in excess of the price agreed upon in said contract, at, to wit, $5,885, when the true value was only, to wit, $3,500.

And these defendants aver that the plaintiff and said appraiser so selected by the plaintiff to invoice said goods, well knowing that said goods were not worth more than three thousand five hundred (3,500) dollars at their then present value, and well knowing that said contract provided that said goods should be invoiced at their then present value, knowingly, falsely and fraudulently invoiced said stock of goods at the sum of five thousand eight hundred and eighty-five (5,885) dollars; that after said invoice was completed, falsely and fraudulently and knowingly represented to these defendants that they had invoiced said goods at their present worth and that the present worth of said goods so invoiced was five thousand eight hundred eighty-five (5,885) dollars, when in truth and in fact the said plaintiff and the said person so selected by him to invoice said goods then and there well knew that the present value of said goods so invoiced was only three thousand five hundred (3,500) dollars, and knowingly, falsely and collusively made and represented the present value of said stock of goods by said invoice at the sum of five thousand eight hundred eighty-five (5,885) dollars for the purpose of procuring the execution of the notes of the plaintiff sued on, when the said plaintiff and said person so selected by him to appraise said goods then and there well knew that the true invoice of the present value of said goods was only three thousand five hundred (3,500) dollars.

And these defendants further aver that at the time of the execution of said notes they did not know and have no means of knowing the value of said goods was not five thousand eight hundred eighty-five (5,885) dollars, or that the invoice made by the said plaintiff and the said person so selected by him that said stock of goods was worth five thousand eight hundred eighty-five (5,885) dollars was false and fraudulent, or that their present value was only three thousand five hundred (3,500) dollars, and had no means of ascertaining that said invoice was falsely and fraudulently made at the time of the execution of said notes.

And these defendants aver that, relying upon said false and fraudulent invoice so collusively made by the said plaintiff and appraiser as being the present worth of said goods, and not knowing that the present worth of said goods was only three thousand five hundred (3,500) dollars, and upon said false and fraudulent representations collusively made by the plaintiff and said appraiser that said invoice of said goods at five thousand and eight hundred eighty-five (5,885) dollars was the invoice at their present

worth and was a true invoice and according to contract, when in truth and in fact said present worth of said goods was three thousand five hundred (3,500) dollars, which was then and there well known to the plaintiff and to the said person so selected by him to so invoice said goods.

And relying upon the calculations made on said invoice as being their present worth, and the ten per cent and five per cent heretofore provided being added for carriage, and having deducted first therefrom the value of said tract of land which was thereupon conveyed by these defendants to the plaintiff, these defendants executed the notes set forth in plaintiff's declaration for the excess in value of said land, and that there is no other consideration for the execution of said notes than the invoice heretofore set forth.

Wherefore these defendants say that the consideration upon which said notes were made has wholly failed, and this the defendants are ready to verify; wherefore they pray judgment if the plaintiff ought to have his aforesaid action."

It was then especially demurred to for the following reasons:

"That the allegations of fraud therein alleged are insufficient, because not allegations of fraudulent representations as to any present existing or past fact at the time such representations purport to have been made; that there is no allegation in said plea, of care or diligence on the part of defendants, Custer and Custer, to protect and guard their interests in the transaction in the plea mentioned; that there is no allegation of artifice or device on the part of the plaintiff to mislead or deceive the defendants, Custer and Custer, from exercising proper care and diligence for the protection of their interests in such transaction, and that said plea fails to affirmatively allege that a third person was selected and agreed upon by the parties to make the invoice mentioned in the plea, and that the plea fails to name any person selected as appraiser, and that the defendants agree to and did accept the appraiser named by the plaintiff as alleged in the plea, and that the values placed on the articles in said plea by appraisers were mere matters of opinion, and that said plea is in other respects informal and insufficient," etc.

And the demurrer was sustained.

The appellants stood by their special plea, as thirdly amended, withdrew the general issue, and the court entered

And these defendants aver that the plaintiff and said appraiser so selected by the plaintiff to invoice said goods, well knowing that said goods were not worth more than three thousand five hundred (3,500) dollars at their then present value, and well knowing that said contract provided that said goods should be invoiced at their then present value, knowingly, falsely and fraudulently invoiced said stock of goods at the sum of five thousand eight hundred and eighty-five (5,885) dollars; that after said invoice was completed, falsely and fraudulently and knowingly represented to these defendants that they had invoiced said goods at their present worth and that the present worth of said goods so invoiced was five thousand eight hundred eighty-five (5,885) dollars, when in truth and in fact the said plaintiff and the said person so selected by him to invoice said goods then and there well knew that the present value of said goods so invoiced was only three thousand five hundred (3,500) dollars, and knowingly, falsely and collusively made and represented the present value of said stock of goods by said invoice at the sum of five thousand eight hundred eighty-five (5,885) dollars for the purpose of procuring the execution of the notes of the plaintiff sued on, when the said plaintiff and said person so selected by him to appraise said goods then and there well knew that the true invoice of the present value of said goods was only three thousand five hundred (3,500) dollars.

And these defendants further aver that at the time of the execution of said notes they did not know and have no means of knowing the value of said goods was not five thousand eight hundred eighty-five (5,885) dollars, or that the invoice made by the said plaintiff and the said person so selected by him that said stock of goods was worth five thousand eight hundred eighty-five (5,885) dollars was false and fraudulent, or that their present value was only three thousand five hundred (3,500) dollars, and had no means of ascertaining that said invoice was falsely and fraudulently made at the time of the execution of said notes.

And these defendants aver that, relying upon said false and fraudulent invoice so collusively made by the said plaintiff and appraiser as being the present worth of said goods, and not knowing that the present worth of said goods was only three thousand five hundred (3,500) dollars, and upon said false and fraudulent representations collusively made by the plaintiff and said appraiser that said invoice of said goods at five thousand and eight hundred eighty-five (5,885) dollars was the invoice at their present

worth and was a true invoice and according to contract, when in truth and in fact said present worth of said goods was three thousand five hundred (3,500) dollars, which was then and there well known to the plaintiff and to the said person so selected by him to so invoice said goods.

And relying upon the calculations made on said invoice as being their present worth, and the ten per cent and five per cent heretofore provided being added for carriage, and having deducted first therefrom the value of said tract of land which was thereupon conveyed by these defendants to the plaintiff, these defendants executed the notes set forth in plaintiff's declaration for the excess in value of said land, and that there is no other consideration for the execution of said notes than the invoice heretofore set forth.

Wherefore these defendants say that the consideration upon which said notes were made has wholly failed, and this the defendants are ready to verify; wherefore they pray judgment if the plaintiff ought to have his aforesaid action."

It was then especially demurred to for the following reasons:

"That the allegations of fraud therein alleged are insufficient, because not allegations of fraudulent representations as to any present existing or past fact at the time such representations purport to have been made; that there is no allegation in said plea, of care or diligence on the part of defendants, Custer and Custer, to protect and guard their interests in the transaction in the plea mentioned; that there is no allegation of artifice or device on the part of the plaintiff to mislead or deceive the defendants, Custer and Custer, from exercising proper care and diligence for the protection of their interests in such transaction, and that said plea fails to affirmatively allege that a third person was selected and agreed upon by the parties to make the invoice mentioned in the plea, and that the plea fails to name any person selected as appraiser, and that the defendants agree to and did accept the appraiser named by the plaintiff as alleged in the plea, and that the values placed on the articles in said plea by appraisers were mere matters of opinion, and that said plea is in other respects informal and insufficient," etc.

And the demurrer was sustained.

The appellants stood by their special plea, as thirdly amended, withdrew the general issue, and the court entered

an order reinstating the judgment and execution, and the appellants excepted.

The appellants prosecute an appeal to this court, and to reverse the order of the court reinstating such judgment and execution, insist that the court improperly sustained the demurrer to the special plea as thirdly amended.

The appellee assigns cross-errors calling in question the entry of the order staying the execution, opening the judgment, and giving the appellants leave to plead, alleging that the affidavit of the appellants in support of their motion for the order was insufficient to warrant the entry of the same.

It is very apparent from reading the affidavit that if the facts there stated were sufficient to warrant the court in entering the order to stay the execution, to open the judgment and giving leave to plead, then the special plea, as thirdly amended, setting up the same facts as a defense to the action on the notes, should have been sustained, and it was error for the Circuit Court to hold that the plea was bad.

Under the doctrine laid down in Murray v. Tolman, 162 Ill. 417, and Snively v. Meixsell, 97 Ill. App. 365, we think the facts set up in the affidavit and alleged in the plea, constitute a good defense to the action on the notes, for the reason that such facts show that the appellants are in a position to invoke the rule that "where the vendee is wholly ignorant of the value of the property, and the vendor knows this, and also knows that the vendee is relying upon his (the vendor's) representation as to value, and such representation is not a mere expression of opinion but is made as a statement of fact, which statement the vendor knows to be untrue, such a statement is a representation by which the vendor is bound."

And it was therefore error for the court to sustain the demurrer to the plea.

It is further insisted that the court improperly entered the order to open the judgment at the instance of the appellants only when there were others against whom it

was also rendered, who did not join in such application, and that the order of the court reinstating the judgment, for that reason worked no prejudice against the appellants.

But in that view we can not concur, because it is clear that an application to open a judgment by confession is always addressed to the equitable as well as to the law powers of the court, and in the exercise of its equitable powers, the court may open it upon the application of any defendant having a meritorious defense to cause of action upon which it was rendered, whether his co-defendants do or do not join him in such application.

For the error above indicated, the order reinstating the execution and judgment is reversed and the case is remanded to the Circuit Court with directions to overrule the demurrer to the third amended special plea.

Reversed and remanded, with directions.

A. J. Taylor v. T. A. McCumber.

1. INSTRUCTIONS—*Where the Court Might Have Directed the Verdict that Was Returned.*—Where the court might have directed the verdict that was returned, errors of instructions will not reverse.

Replevin.—Appeal from the City Court of Canton; the Hon. P. W. GALLAGHER, Judge presiding. Heard in this court at the May term, 1902. Affirmed. Opinion filed November 1, 1902.

GRANT & GRANT and FRED H. SNYDER, attorneys for appellant.

W. S. JEWELL, attorney for appellee.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

This was a suit in replevin for a cash register, instituted before a justice of the peace by appellant against appellee and Albert Harper. The cause was taken to the city court by appeal, and there dismissed as to the defendant Harper. There was a trial by jury resulting in a verdict for the

defendant. The court overruled appellant's motion for a new trial and gave judgment upon the verdict against appellant, which he seeks to reverse by appeal to this court. The errors argued in this court, by which the reversal of the judgment is sought, consist of wrong instructions to the jury.

There is no conflict of evidence except as to the price of the cash register and the payment thereof. Appellant testified that he first loaned the register, and then sold it, to McCumber, for $100, and that the latter had paid no part of the purchase price. McCumber testified that he purchased the register of appellant for seventy-five dollars and paid him the cash for it at the time of the purchase. McCumber was corroborated by two other witnesses, who also testified to the sale by appellant of the register to appellee for seventy-five dollars and that the money was paid and accepted. There then was no dispute concerning the material facts in the issue. The dispute relative to the amount of the price and its payment was not material as affecting the ownership of the property or the right to its possession. The sale to McCumber was absolute, no reservation of any kind having been made, and the possession remained with him. However, if the amount of the price and its payment had been material the great weight of the evidence was with appellee, and a verdict against him upon such issue could not be sustained. The verdict was therefore right, upon the evidence in the case. No other verdict could have been sustained. The court might well have directed the verdict that was returned, and where this is true it has often been held that errors of instructions will not reverse. The instructions in the case of which complaint has been made, can not be maintained. They were erroneous for many reasons, but for the reason we have already assigned they did appellant no harm, and it would be a task of supererogation for us to point out the many vices and infirmities contained in them.

Finding no reversible error the judgment of the trial court will be affirmed.

105 89
s111 243

Illinois Central R. R. Co. v. A. C. Seitz.

1. CONTRACTS—*Carrier Has No Right to Change Freight Rate After Shipping Contract is Made.*—After goods are received by a carrier, the freight rate given and the contract closed, the carrier can not re-classify the goods and change the rate, in the absence of fraud by the shipper.

2. EVIDENCE—*Of Value of Goods Should be Given Independently of Memorandum.*—Evidence of the value of goods should be the individual opinions of the witnesses and should not be repetitions of the valuation contained upon a paper they have examined.

Trover.—Appeal from the Circuit Court of Christian County; the Hon. WILLIAM M. FARMER, Judge presiding. Heard in this court at the May term, 1902. Reversed and remanded. Opinion filed November 1, 1902.

JAMES M. TAYLOR, attorney for appellant; JOHN G. DRENNAN, of counsel.

HOGAN & DRENNAN, attorneys for appellee.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

Appellee caused to be shipped by appellant, in the name of Kendal, from Chicago to Pana, Illinois, groceries, counters, shelving, and one horse, harness and wagon. The freight demanded at Chicago for the shipment in one car load was $28, which was there paid. Upon the arrival of the car at Pana, appellant demanded $15.18 additional freight, which appellee refused to pay, and brought this suit in trover for the value of the property. By a jury trial he recovered $1,237, and the court, after having overruled appellant's motion for a new trial, gave judgment against it for that sum, to reverse which it prosecutes this appeal, insisting chiefly, for such purpose, that the court admitted improper evidence, gave wrong instructions, the verdict is against the law and the evidence, and the damages are excessive.

The facts are simple, and contain but little variety. Appellee owned the goods and sent Kendal to get the car

and arrange for the freight rate. Appellee had before that time inquired for rates of shipment in single car lots, but received no definite information; the person to whom he applied told him it might be from $25 to $35. The car was furnished at Kendal's request, and loaded with the goods by appellee and Kendal, and the classification for the freight was made by a clerk in appellant's office. Whether this classification was made upon the representation of Seitz and Kendal concerning the kind of goods shipped or not, was a disputed fact. There was no effort to conceal the property when it was being loaded into the car, and it is fair to infer, if not directly proved, appellant knew the character of it. It is admitted that a part of the property would classify as emigrant movables, and that classification was in fact attached to all of it, by appellant's clerk, and the rate of freight thereby fixed at the seventh class, amounting to $28, and the shipping receipt delivered accordingly, including a receipt for $28, the freight which was then paid. After this an inspector of the Western Railway and Inspection Bureau inspected the freight in the car, and there changed its character upon the duplicate shipping bill, from emigrant movables to groceries, whereby the freight rate was raised to the first class, adding $45.18 to the amount already paid. This was done without notice to either appellee or Kendal. The inspector was not in the employ of appellant, but appellant having adopted his act, thereby ratified it, and made him its agent. We are not impressed by the insistence of counsel that appellee or Kendal so misrepresented the character of the goods that it can now claim it is not bound by the contract it in fact made. There was no fraud in all that occurred. The property was open to inspection, and it can not be reasonably presumed that a common carrier is ignorant of the nature of the property delivered to it for shipment. Such presumption would be inconsistent with the care required by law to be bestowed upon it. It was no part of the appellee's duty to classify the property for freight purposes; this was the province of appellant, and if through the care-

lessness of its clerk a mistake was made, without the fault of appellee, and upon that basis it made its contract, as we think it did, to ship the property to Pana for $28, it was bound to do so. The consideration was a valuable one, and of appellant's own making. It proposed to appellee to ship the property for a stipulated rate, described or characterized the property of its own volition as emigrant movables, and appellee accepted the proposition. Like an individual, appellant must be held to perform its contracts, fairly entered into, as we think this one was. It is also argued that appellee can not maintain the suit for the reason that the shipping bill was in the name of Kendal, as it was, and until Kendal indorsed it to Seitz the legal title to the property was still in the former, and many authorities are cited to prove this. As a general proposition it is undoubtedly true, that a stranger can not lawfully demand or receive the consignment; but here appellant recognized and dealt with Seitz as the owner of the property; there is no dispute about his ownership, and this appellant knew. It did not refuse to deliver the property to him because the shipping bill had not been assigned to him, but for the sole reason that the excess of freight was unpaid. Had appellant desired to put its refusal upon the ground that the shipping bill was not present, it should have done so; but it did not, and therefore waived it. Kendal also was asking and demanding that the property be delivered to Seitz, and he claimed no interest in it. The instructions of the court were in harmony with the views we have already expressed, and there was no prejudicial error in them.

The court, over the objection of appellant, admitted in evidence a memorandum, made by appellee, of a general description and value of the property. This paper contained the valuation of $1,210.06, and both Seitz and Kendal, while testifying as witnesses, referred to the memorandum, and stated the value of the goods was twelve hundred and ten dollars. Whether they expressed this as their own individual opinions, or whether they merely

quoted from the memorandum, is, from the evidence, uncertain. At any rate their statements are in exact accord, and from that circumstance it is almost certain their testimony upon that point was but a repetition of the valuation contained upon the paper they then examined. To render their statements competent as evidence, they should be able to give the value of the property independently of the memorandum. It is said by counsel for appellant, and admitted by the opposite counsel, that the court, as the jury was retiring, excluded this paper from the evidence, but this is not shown in the abstract. We are of the opinion the memorandum was incompetent evidence to prove the value of the property, and the mere statements of appellee and Kendal, based upon such memorandum, were of no greater probative value than the memorandum itself. If the memorandum was excluded by the court there was no evidence remaining upon which the verdict could stand. Excluding, then, this evidence, there is nothing remaining in the record to support the verdict of $1,237, so far as we have been able to discover. The evidence for appellant upon the value of the property showed it to be quite meager. We are of the opinion the evidence does not support a verdict for the amount that was returned, and that therefore the damages are excessive, and for this reason the judgment of the Circuit Court will be reversed and the cause remanded for a new trial.

Charles Frink v. C. L. Potts, by His Next Friend.

1. MASTER AND SERVANT—*Where Servant Fails to Use Appliances Furnished Him.*—Where the servant fails to use a stick furnished him for the purpose of safely cleaning the rollers of a corn shredder, but chooses the more dangerous method of using his hand for that purpose, he assumes all the risk incident to the increased danger which he thereby incurs.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of McLean County; the Hon. COLOSTIN D. MYERS, Judge

presiding. Heard in this court at the May term, 1902. Reversed. Opinion filed November 1, 1902.

CHARLES I. WILL and BARRY, MORRISSEY & FIFER, attorneys for appellant.

LIVINGSTON & BACH, attorneys for appellee.

MR. JUSTICE BURROUGHS delivered the opinion of the court.

The appellee, C. L. Potts, a minor, by S. J. Potts, his next friend, brought an action on the case in the Circuit Court of McLean County against the appellant, Charles Frink, to recover damages for injuries sustained to his right hand while he was assisting the appellant to operate a corn shredder on the farm.

The case was tried by jury and resulted in a verdict and judgment in favor of the appellee for $750. The appellant moved for a new trial, which was denied. He excepted, brings the case to this court by appeal, and to effect a reversal of the judgment, among other things urges that the verdict is contrary to the evidence, and for that reason the Circuit Court ought to have directed a verdict in his favor as requested at the close of the evidence for the appellee. and again at the close of all the evidence.

The declaration charges that the appellant engaged the appellee, who is a minor, to assist him in operating a hay press; but instead of putting him at that work, put him to removing corn stalks off the rollers of a corn shredder while in operation, with a stick, which work exposed him to great danger, of which he was ignorant; that the appellant failed to inform the appellee of such danger before setting him to do that work, and assured him that he (appellee) was safe in doing that work; that the appellee, relying upon that assurance, set to doing that work, and while using ordinary care for his own safety, got his right hand caught by the screws on the rollers and it was greatly injured.

The appellant pleaded not guilty. The evidence shows that the appellant was operating a hay press and a corn shredder, and employed the appellee, who was at the time eighteen and a half years old, and a very intelligent young

man, to aid him in operating the hay press or the shredder as occasion might require. The appellee commenced working for the appellant on November 4, 1901, and his duties were to haul water, oil the corn shredder and keep the husking rollers thereof clean when occasion required. There were twelve of these rollers, which worked in pairs, those of each pair turning inwardly. The rollers of each pair are set so close together that nothing thicker than the blade of an ordinary knife can pass between them. There are screws set on the surface of the rollers so that when the rollers turn, the screws catch the shucks and strip them off the ears of corn. Between every pair of rollers, there is a dividing iron extending five or eight inches above their entire length. The rollers are plainly visible while the shredder is in operation. When the appellee was set to work, he was told by the appellant to use the stick furnished him to clean the rollers, and not to clean it without the stick for the reason that it was dangerons to clean it with his hands as they might get caught by the screws on the rollers. The stick which was furnished to the appellee to clean the rollers with, was three and a half feet long, two inches wide, and one and a half inches thick. The appellee worked around the shredder all of the first day of his employment and until the afternoon of the second, when, while cleaning the rollers, the glove on his right hand got caught by the screws on the rollers and his hand was badly injured.

The appellee testified that while using the stick to clean the rollers in the manner that the appellant showed him, it got caught in them and pulled his hand down to the screws, which injured it. He also testified that after working a while cleaning the rollers, he found it was very dangerous work and on that account wanted to quit it, and so informed the appellant, who assured him that by using the stick he was in no danger; and that relying upon that assurance he continued to clean the rollers with the stick until his hand was hurt in the manner above indicated. The appellant, however, testified that the appellee never

told him that he wanted to quit cleaning the rollers because he found the work endangered him. There were several witnesses who testified that they saw the appellee frequently use his hands without the stick to clean the rollers; that they said to him not to do so or he would get his hands hurt, and he replied that he would not get hurt. Just after appellee's hand was hurt, the stick was found near where he stood when hurt, and it showed no indication whatever of being caught in the shredder; and the evidence clearly shows that it was impossible for it to get caught and pull appellee's hand onto the rollers in the way he testified that it did.

At the close of appellee's evidence, the appellant moved for a peremptory instruction to the jury to return a verdict in his favor, and presented to the court a written instruction to that effect, with the request that it be given, but the court refused to grant the instruction, to which ruling the appellant excepted; and again at the close of all the evidence, the appellant renewed his said motion and request for a peremptory instruction, both of which, however, the court again denied, and he again excepted.

It is manifest from the evidence that the appellant was using his right hand to clean the rollers at the time he got it hurt, when he should have been using the stick as instructed by the appellant. The use of his hand without the stick under the circumstances, was clearly against the directions of the appellant, and was clearly such negligence on his part as precludes him from recovering any damages from the appellant for the injury received in direct consequence of his own foolish act.

There is no dispute but that the appellant understood that if his hand got too near the rollers when they were in motion, it would be injured, and that the stick was given him to clean them with, so as to avoid getting his hand near them; and when he failed to use the stick as directed, and chose to use his hand in the manner he did, he assumed all the risk incident to the increased danger which he thereby incurred. Jones v. Roberts, 57 Ill. App. 56; Chicago &

Alton R. R. Co. v. Pettigrew, 82 Ill. App. 33; Marsden Co. v. Johnson, 89 Ill. App. 100; and Ryan v. Armour, 166 Ill. 568.

The trial court should therefore have given the peremptory instruction as requested by the appellant, and for that reason the judgment will be reversed, with a finding of facts.

Finding of facts to be incorporated in the judgment:

And it is found as a fact that the injury of which the appellee complains was inflicted in consequence of his own negligence and not as a result of any negligence on the part of the appellant; that the appellee chose to clean the rollers of the corn shredder with his hand instead of with the stick as directed by the appellant, and he was injured for that reason; and that in so doing he chose a more dangerous mode of performing his work than that directed by the appellant, in consequence of which the appellee assumed the hazard of being injured in the manner in which he was. And that the appellee, at the time he was injured, understood the danger of using his hand instead of the stick to clean the rollers of the corn shredder.

105 96
a205s 9

The Illinois Central R. R. Co. v. John F. Byrne.

1. EVIDENCE—*Province of Jury Where it is Conflicting.*—Where the evidence is conflicting upon the vital question of fact tried, it is the province of the jury to determine where the truth lies.

Assumpsit.—Appeal from the Circuit Court of McLean County; the Hon. GEORGE W. PATTON, Judge presiding. Heard in this court at the May term, 1902. Affirmed. Opinion filed November 1, 1902.

CHARLES L. CAPEN, attorney for appellant; J. G. DRENNAN, of counsel.

A. E. DEMANGE, attorney for appellee.

OPINION PER CURIAM:

This case was before us at a former term and a statement thereof appears in 78 Ill. App. 204.

After it was remanded to the Circuit Court it was again tried by jury and resulted as before in a verdict and judgment in favor of the appellee, but the damages were assessed at $100 less.

The errors alleged upon this second appeal are many, and an elaborate brief and argument for the appellant is submitted in support thereof, but a careful examination of the record has convinced us that the rulings of the trial court on the admission and rejection of evidence and the instructions to the jury were all substantially correct.

The remarks of the trial judge complained of were not calculated to prejudice the appellant before the jury and hence do not constitute reversible error.

The evidence now in the record is substantially as it was when the case was before us heretofore, and being conflicting upon the vital questions of fact tried, it was the province of the jury to determine where the truth was, and we are unable to find in the record any substantial reason appearing which indicates that they made a mistake, and therefore the judgment will be affirmed.

Henry O. Wheeler v. City of Bloomington.

1. DAMAGES—*Caused by Public Improvement.*—In cases of damages caused by the construction of a public improvement, the correct measure of damages is the difference between the value of the property without the improvement and its value with the improvement.

Trespass on the Case.—Damages caused by raising the grade of streets. Appeal from the Circuit Court of McLean County; the Hon. COLOSTIN D. MYERS, Judge presiding. Heard in this court at the May term, 1902. Affirmed. Opinion filed November 1, 1902.

LIVINGSTON & BACH and WELTY & STERLING, attorneys for appellants.

MILES K. YOUNG, city attorney, for appellee; KERRICK & BRACKEN, of counsel.

MR. JUSTICE HARKER delivered the opinion of the court.

Appellant brought this suit to recover damages which he claims were caused by appellee raising the grades of Front and Low streets adjacent to his property. Front street in Bloomington extends east and west, and Low street north and south Appellant's property consists of a lot 120 feet square, 120 feet fronting on the south line of Front street, and 120 on the east line of Low street. On the corner is a two-story brick business house, south of that building, and fronting on Low street is a two-story dwelling house. East of the brick building and fronting on Front street is a one-story frame house.

In 1897 the city began grading the streets named, and constructed brick pavements along the property. In making the improvement the grade was raised above what it had been. There is a conflict as to how much—some witnesses fixing it at three inches, and others at fifteen inches. It is claimed by the appellant that the effect of the raising of the grade was to throw surface water upon his lot and into the basement, and under the buildings, that would not have gone there otherwise.

The case was defended upon the theory that the benefits to the property by the improvements exceeded the damage and what appellant had paid for the improvement by special assessment. There was a great diversity of opinion among the witnesses upon that question, as there usually is in such cases. The jury visited the property under instructions from the court and returned a verdict in favor of the city.

Upon the trial, and after the evidence had been heard, appellant asked leave to file an additional count. The court refused, and that is assigned for error. The additional count differs but slightly from those already filed, and we are unable to see how appellant was prejudiced by the court's refusal. Under the circumstances it was a matter of discretion for the court.

Appellant offered in evidence a petition presented to the city council on March 14, 1900, asking the city to fill up

his lot when it could conveniently do so, and proof of the favorable action of the city council thereon, but the court sustained an objection to it. We think there was no error in such ruling; it is a matter of common experience that low lots are often filled up by the dumping of surplus dirt which the city, in making improvements, must get out of the way and dispose of. The consent of the city to dump such dirt upon appellant's lot when it should be convenient so to do, could not be regarded as an admission of liability or the admission of a material fact in issue.

We see nothing wrong with the instructions given for appellee. Those relating to the measure of damages followed the well recognized line laid down in Illinois cases, that the correct measure of damages is the difference between the value of the property without the improvement and its value with the improvement.

We do not care to go into a discussion of the conflicting evidence heard by the jury. The jury not only saw the witnesses, but viewed the property. Their opportunities for placing a correct estimate upon the relative benefits and damages occasioned by the improvement are so far superior to ours that we are content to say that their judgment upon the real question at issue before them is of controlling weight with us.

Appellant, in support of his motion for a new trial, makes a weak attempt to show improper conduct on the part of one of the jurors. The affidavits presented upon that matter neither gave the name of the juror attacked nor stated what was said in the alleged improper conversation had by him. We see no just ground for disturbing the judgment, and the same will be affirmed.

Henrietta Salzenstein et al. v. Daniel M. Hettrick.

1. DEBTOR AND CREDITOR—*Conveyance to Defraud Creditors.*—Where one party is the debtor of another when he makes a conveyance, the effect of which is to hinder and delay his creditor in the collection of the debt, it matters not that there was no design on the part of the

grantor and the grantee to defraud him. The vital question is, does the conveyance deprive the creditor of a right which would be legally effective had the conveyance never been made. Every conveyance of property made by the parties to it, with a design to hinder, delay or defraud creditors in the collection of their debts, is void as to any existing creditor, whether made with or without a valuable consideration.

Bill for an Injunction.—Appeal from the Circuit Court of Fulton County; the Hon. JOHN A. GRAY, Judge presiding. Heard in this court at the May term, 1902. Affirmed. Opinion filed November 1, 1902.

M. P. RICE, attorney for appellants.

H. W. MASTERS & SON, attorneys for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

Henrietta Salzenstein filed a bill in the Circuit Court of Fulton County to enjoin the sheriff from selling certain lands which had been conveyed to her by her father, Levy Meiers, and which had been levied upon by virtue of an execution from a judgment in favor of Daniel M. Hettrick against Meiers. In her bill she claimed entire ownership, legal and equitable, in the land, by reason of a purchase and conveyance made November 26, 1898. A temporary injunction, restraining the sale, was granted.

Hettrick, after filing an answer which denied that Mrs. Salzenstein was the owner of the land and averred that the conveyance to her was a mere sham, presented a cross-bill, in which he charged that the conveyance was fraudulent as to creditors and asked that it be set aside so that his execution might be satisfied by a sale of the lands. Mrs. Salzenstein and Meiers answered, denying that the conveyance was fraudulent and averred that it was made in good faith in accordance with a purchase of the lands. The cause was referred to the master for proof and findings. The master, after taking the proofs, reported that the conveyance was fraudulent and recommended that the prayer of the cross-bill be granted, that the temporary injunction, before then allowed, be dissolved, and that the original bill be dismissed. The court, after overruling exceptions to the report, approved the same and rendered a decree which set

aside the conveyance as fraudulent, dissolved the temporary injunction, dismissed the original bill and required the complainant therein to pay $25 damages for wrongfully suing out the injunction.

There is a conflict in the testimony as to whether the conveyance was made in good faith or made to hinder and defraud creditors. Hettrick testified that when he was pressing Meiers for the payment of his note and reference was made to the conveyance of the land to his daughter, both Meiers and Mrs. Salzenstein told him that the transaction was a sham sale and that as soon as Meiers got matters fixed up with his creditors, the land would be deeded back to him. Three other witnesses testified that Meiers and Mrs. Salzenstein at another time, while appearing as witnesses in their own behalf in a suit pending against them before a justice of the peace, stated that the conveyance was made merely to enable Meiers to effect a settlement with creditors that were crowding him. Appellants denied making such statements and testified that the transaction was a sale made in good faith and that Mrs. Salzenstein paid in cash to Meiers and to creditors in discharge of his debts an amount exceeding $15,000, the full value of the land. They were corroborated by a son of Mrs. Salzenstein. In the conflict, it was the peculiar province of the chancellor to find the truth. Having the witnesses before him where he could see them and observe their manner of testifying, his opportunities for discovering the truth were vastly superior to ours. If appellee and the three witnesses who testified to what appellants stated in the trial before the justice told the truth, there was ample room for finding that the conveyance was a fraud against appellee. He was a creditor of Meiers when the conveyance was made and had been for more than two years. The effect of the conveyance was to hinder and delay him in the collection of the debt. It matters not that there was no design on the part of the grantor and the grantee to defraud him. Assuming that appellee testified to the truth, it was the purpose of the grantor in making the conveyance to place his property

where it could not be reached by creditors who were pressing him for payment. The grantee was chargeable with notice of that fraudulent purpose, because she knew all the facts and circumstances. She knew and said it was a sham sale, and although she afterward may have paid to her grantor and his creditors all the property was worth, and had no special design of defrauding appellee, still the transaction was fraudulent as to his rights, and the property is chargeable with the payment of his judgment. The vital question is, does the conveyance deprive him of a right which would be legally effective had it never been made. Every conveyance of property made by the parties to it, with a design to hinder, delay or defraud creditors in the collection of their debts, is void as to any existing creditor, whether made with or without a valuable consideration. Boies v. Henney, 32 Ill. 130; Weber v. Mick, 131 Ill. 520; Beidler v. Crane, 135 Ill. 99; Oakford v. Dunlap, 63 Ill. App. 503; Rahn v. Kniess, 74 Ill. App. 367.

Some complaint is made of the action of the court in allowing $25 damages on the dissolution of the injunction. It is claimed there is no evidence in the record on which to base such allowance. There is a recital in the decree, however, that $25 was agreed upon as a reasonable solicitor's fee in the matter. In view of that recital, it was not necessary to have preserved in the record evidence showing that the fee was reasonable and proper. Decree affirmed.

L. N. Ashley v. Henry Heinrichs.

1. VERDICT—*Where Evidence is Sufficient to Sustain it, it Will Not Be Reversed.*—Where the evidence is sufficient on the part of the plaintiff to sustain the verdict and the judgment, it will not be reversed because of evidence tending to prove the defendant's claim. In such cases it is the province of the jury to determine where the truth lies.

Trespass on the Case.—Damages caused by damming up an open drain. Appeal from the Circuit Court of Ford County; the Hon. JOHN H. MOFFETT, Judge presiding. Heard in this court at the May term, 1902. Affirmed. Opinion filed November 1, 1902.

CLOUD & MOFFETT, attorneys for appellant.

SCHNEIDER & SCHNEIDER and KERR & LINDLEY, attorneys for appellee.

MR. JUSTICE BURROUGHS delivered the opinion of the court.

The appellee, Henry Heinrichs, sued the appellant, L. N. Ashley, in the Circuit Court of Ford County, to recover damages to his crops alleged to have been occasioned by the wrongful damming up of an open drain which had been constructed and maintained through the lands of each, under an agreement made prior to July 1, 1889, which agreement had not been revoked before that time.

The case was tried by jury and resulted in a verdict and judgment in favor of the appellee for $630.04.

The appellant having moved for a new trial, which was denied, excepted, and he brings the case to this court by appeal, and to effect a reversal of the judgment argues that the court ruled erroneously on the evidence and upon the instructions to the jury, and that the verdict and judgment are against the evidence.

The evidence on the part of the appellee is amply sufficient to sustain the verdict and the judgment, and while that on the part of the appellant tends to establish a revocation by him prior to July 1, 1889, of the agreement to continue the drain, yet it was the province of the jury to determine where the truth was, and the record does not warrant us in concluding that the jury have made a mistake in the conclusion they arrived at.

A careful examination of the rulings of the trial court upon the evidence and instructions convinces us that no prejudicial error was committed against the appellant in any of them, but on the contrary such rulings were fair and just to both parties, and it seems to us that on the whole record the conclusions which the trial court reaches in this case, does justice to both parties, and therefore the judgment rendered ought to be and will be affirmed.

Louis Moulton v. I. N. Gibbs et al.

1. EVIDENCE—*To Prove that Other Animals Sold at the Same Sale Were Sound, Inadmissible.*—In an action for damages caused by the sale of a diseased mule at an auction sale, evidence tending to prove that none of the other mules sold on the same occasion were afflicted, is inadmissible.

2. INSTRUCTIONS—*Circumstantial Evidence.*—An instruction which states that in determining what facts are proven in the case the jury should carefully consider all the facts before them, with all the circumstances of the transaction in question as detailed by the witnesses, and that they may find any fact proven which they may believe from the evidence may be rightfully and reasonably inferred from the evidence given in the case, although there may not be any direct testimony as to such facts, is proper. By its refusal the value of the circumstantial evidence would be destroyed and no fact could be established save by positive and direct evidence.

2. SAME—*Invading Province of the Jury.*—An instruction by which the jury are told that although they may believe from the evidence that the mule took sick and died a few days after plaintiff obtained possession of it from the defendants, yet this of itself is not sufficient to justify them in finding a verdict for the plaintiff, is erroneous, as invading the province of the jury to determine questions of fact.

Assumpsit. upon a contract of warranty. Appeal from the City Court of Mattoon; the Hon. LAPSLEY C. HENLY, Judge presiding. Heard in this court at the May term, 1902. Reversed and remanded. Opinion filed November 1, 1902.

ANDREWS & VAUSE, attorneys for appellant.

JAMES W. and EDWARD C. CRAIG, attorneys for appellees. FRANK T. O'HAIR, of counsel.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

This suit was by appellees against appellant, upon a contract of warranty contained in the sale of a mule by the latter to the former. The jury found the issues against appellant, and the court, after overruling his motion for a new trial, gave judgment against him in bar of the action, to reverse which this appeal is brought to this court, and to effect such reversal it is argued the court erred in its rulings upon the evidence and the instructions in the case.

Appellant purchased two mules at an auction sale, of the appellees, at which all the mules sold were, by the auctioneer, warranted sound, and if not, they would be made so. Directly after the purchase appellant took the mules from where they, with others, had been stabled, and where they remained at the time of the sale, in the city of Mattoon, and from there they were, with no delay, taken to the home of appellant upon his farm in the country. Appellant and another man, who assisted him in transferring the mules, testified that one of the mules coughed while being taken from the barn where the sale occurred, and while on the road to the home of appellant it was sick. This sickness continued for six days, when it died. The evidence established the fact that the mule died of lung fever. The evidence was conflicting as to the point whether the mule was diseased before and at the time of the sale, and from the nature of the evidence in the case, the determination of this fact depended greatly upon natural and reasonable inferences to be drawn from facts and circumstances directly proven, and the evidence of the respective parties being contrarious on this vital issue, accurate instructions and rulings upon the evidence affecting such issue, were demanded.

While upon the witness stand appellant was asked if the other mule, the one that lived, coughed, to which the court sustained appellees' objection; to which ruling appellant excepted. While one of the appellees was a witness he was asked if either mule at the time of the sale had lung fever, or anything of that sort, to which appellant objected, but the court overruled the objection, and the answer was that none of the mules had lung fever. Over appellant's objection the same witness was permitted to say that a mule with lung fever could not be driven twice, a mile and one half each time, on the same day, there having been evidence tending to show the deceased mule had been so driven. It is argued that in these rulings of the court there was prejudicial error. The issue then being tried was whether the one mule that died was diseased at the time of the sale,

and inasmuch as it was not contended the disease with which it was afflicted was contagious or infectious, the court properly ruled in the first instance that evidence affecting the other mule was inadmissible. Had the court persisted in such ruling, no error would have occurred in that respect; but this was not done, and on the contrary the court permitted appellee to prove none of the other mules were afflicted. This was misleading and prejudicial, because, from such evidence, the jury could only infer that if none of the other mules were then sick, it was probable this one acquired its disease after having been taken from the stable, and this we think would be incompetent. Besides this, the rulings of the court were inconsistent as applied to either side of the case. The same strictness or liberality of ruling should be applied to both sides of the case. Whether or not a mule with lung fever could be driven twice the same day, a mile and a half each time, as the witness was permitted to say it could not, was a question for the jury to decide from all the evidence in the case, and not for any witness, however expert he might be, especially when the stage of severity of the disease was not hypothetically put to him.

The court refused to give, at the request of appellant, the following instruction, which appellant insists was reversible error:

"The court instructs the jury that in determining what facts are proven in this case, you should carefully consider all the facts before you, with all the circumstances of the transaction in question as detailed by the witnesses; and you may find any fact proven which you may believe may be rightfully and reasonably inferred from the evidence given in the case, although there may not be any direct testimony as to such facts."

The court at the instance of the defendants gave to the jury the following instruction, which has been argued as containing prejudicial error:

"The court instructs the jury that although you may believe from the evidence that the mule took sick and died a few days after plaintiff obtained possession of it from the

defendants, yet, this of itself is not sufficient to justify you to find a verdict for the plaintiff. The court instructs you that before you can find for the plaintiff, in addition to this fact you must believe from a preponderance of the evidence, first, that the defendants warranted the mule to be sound, and second, that the mule was not sound at the time the defendants sold him to the plaintiff. And unless you so believe from a preponderance of the evidence it will be your duty to find your verdict for the defendants."

Combining the action of the court in the refusal of the one and the giving of the other instruction, in view of the evidence in the case, we are constrained to believe there was prejudicial error. The refused instruction could only properly refer to the recently discovered sickness of the mule after the sale, and the instruction given expressly informs the jury that this fact is not sufficient to justify the jury in finding for the plaintiff. Whether the fact that the mule sickened and died soon after the purchase was sufficient evidence upon which to find that it was diseased when the sale was made, was a question of fact to be determined by the jury from all the evidence in the case, and it was error for the court to refuse the instruction upon that point and at the same time give an instruction that clearly invaded the province of the jury. If the refused instruction should not be held as law, in every case the value of circumstantial evidence would be destroyed, and no fact could be established save by positive or direct evidence.

For the errors pointed out the judgment of the trial court will be reversed and the cause remanded for a new trial.

John Dayton v. Frank L. Kidder.

1. SALES—*Rule of Caveat Emptor.*—While the rule of *caveat emptor* as applied to public sales of personal property is universally recognized in this country, there is not entire harmony in the holdings as to what duty rests upon the vendor in disclosing secret defects within his knowledge. In some jurisdictions it is held that if the vendor has knowledge of hidden defects in the article offered for sale, and especially of

such defects as would render it unfit for the purposes intended by the buyer, it is the duty of the vendor to disclose them, and that his failure to do so is actionable fraud. The weight of authority is, however, that mere silence upon the part of the seller when he knows the bidder is ignorant of the hidden defects, and with such ignorance buys what he otherwise would not, does not constitute such fraud as would bar an action. To that rule the courts of Illinois are committed.

2. SAME—*Acquiescing in False Statement of Auctioneer.*—Standing by and hearing an auctioneer make a false statement concerning property without correcting him, constitutes an acquiescence on the vendor's part in the false statement made by the auctioneer, and is an active fraud. It is not a passive concealment; it is a false averment.

Trespass on the Case, for fraudulent sale of diseased cattle. Appeal from Edgar County; the Hon. HENRY VAN SELLAR, Judge presiding. Heard in this court at the May term, 1902. Reversed and remanded. with directions. Opinion filed November 1, 1902.

DUNDAS & O'HAIR and J. W. SHEPHERD, attorneys for appellant.

H. S. TANNER, attorney for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

The court below sustained a general demurrer to appellant's amended declaration. Appellant stood by his declaration, whereupon the court dismissed his suit and rendered judgment against him for costs. The sole question for our decision, therefore, is the sufficiency of the amended declaration.

It alleges, in substance, that appellee was the owner of forty heads of cattle, which he consigned to one George Augustus to be sold at auction as sound cattle to the highest bidder; that the cattle were diseased and that appellee knew that they were diseased; that such disease was not known to appellant and could not be ascertained by ordinary inspection, and that there was nothing in either their actions or appearance at the time by which it could be discovered that the cattle were not sound and all right; that the cattle were thin and that Augustus, in explaining their condition, announced in the presence of appellee and appellant that they had been kept on short pasture, but would make good cattle, whereas their thin

condition was the result of disease from which they were then suffering. The declaration further avers that by reason of the statement of Augustus and the silence and fraudulent concealment of defendant in not making known the fact that the cattle were diseased, the plaintiff offered a sound price for them and the same were struck off to him for the sum of $990. It further alleges that had the cattle been sound and free from disease, they would have been worth the sum of $990, whereas, on account of the disease from which they were suffering, they were not worth more than $200. It further avers that after they were delivered to him, the sickness of the cattle increased so that, although he exercised all due care for them many of them died of the disease, while others became so disabled as to become worthless.

While the rule of *caveat emptor* as applied to public sales of personal property is universally recognized in this country, there is not entire harmony in the holdings as to what duty rests upon the vendor in disclosing secret defects within his knowledge. In some jurisdictions, it is held that if the vendor has knowledge of "hidden defects" in the article offered for sale, and especially of such defects as would render it unfit for the purposes intended by the buyer, it is the duty of the vendor to disclose them and that his failure to do so is actionable fraud. The weight of authority is, however, that mere silence upon the part of the seller when he knows the bidder is ignorant of the hidden defects, and with such ignorance buys what he otherwise would not, does not constitute such fraud as would bear an action. To that rule, the courts in Illinois are committed. Kohl v. Lindley et al., 39 Ill. 195; Morris v. Thompson, 85 Ill. 16.

The rule is based upon the necessity of letting men take care of themselves in their business dealings; and so the seller may let the buyer cheat himself *ad libitum*, provided he does not actively assist him in cheating himself. The law does not oblige the seller to disclose all that he knows which lessens the value of the property offered for sale.

He may be silent and leave the purchaser to inquire and examine for himself; but if he be more than silent, if he by acts and words leads the buyer astray, thereby preventing the latter from making further examination or inquiry, he becomes guilty of a fraud of which the law will take cognizance. The rule is thus stated by Mr. Justice Breese in Kohl v. Lindley et al., *supra:*

"To make the mere suppression of a fact such a fraud as will justify a court in declaring the contract void, we believe the modern and more correct doctrine to be, there must be something more than a failure to communicate facts within the knowledge of the party selling—there must be concealment; and that may consist, in withholding the information when it is asked for, or by making use of some device to mislead, thus involving act and intention."

The declaration charges in this case that the defendant, knowing that the cattle were diseased and knowing that that was the cause of their thin condition, heard the auctioneer announce, in the presence of the plaintiff, as a reason for their being in that condition, that they had been on short pasture, and that acting upon defendant's acquiescence in that statement, the plaintiff believed the cattle to be sound and that that was the reason why they were in a thin condition and, therefore, made no further inquiry, but purchased the cattle as sound. We think it was the duty of defendant, when he thus saw the plaintiff was misled by the false statement, to correct the statement of the auctioneer. He saw that the plaintiff was being misled by that statement and that that was doubtless the reason why he made no further inquiry concerning the cattle being in that condition. It was virtually an acquiescence on his part in the false statement made by the auctioneer. This we deem to be active fraud on the part of defendant. It was not a passive concealment; it was a false averment. It was not the vendor's silence, but his active misrepresentation by acquiescing in the words of his agent, the auctioneer, to the material damage of the buyer, that constituted the legal fraud. It allayed the buyer's suspicions; it helped him to cheat himself.

For the reason that the averments contained in the declaration show that appellee was guilty of active fraud, we reverse the judgment and remand the cause with directions to the Circuit Court to overrule the demurrer to the amended declaration.

---

105 111
r212s 87

The Wabash R. R. Co. v. Thomas Billings.

1. NEGLIGENCE—*Backing Cars upon Crossing While Another Train is Passing.*—It is negligence to back an engine and cars toward, and upon, a crossing, while another train is passing, unless due care is taken to give warning of the danger.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge presiding. Heard in this court at the May term, 1902. Affirmed. Opinion filed November 1, 1902.

C. N. TRAVOUS, attorney for appellant.

S. H. CUMMINS and T. J. SULLIVAN, attorneys for appellee.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

This suit was brought by appellee against appellant for personal injuries, in consequence of the alleged negligence of the latter in backing an engine and cars upon the crossing of Adams street in the city of Springfield. The jury returned a verdict for $5,000, and the court, after requiring a remittitur of $2,000, overruled appellant's motion for a new trial, and gave judgment for $3,000, to reverse which this appeal is brought. The points relied upon for such reversal are (1) the refusal of the court to direct the verdict at the instance of appellant; (2) the verdict is contrary to the evidence; (3) the court gave erroneous instructions for the plaintiff; and (4) improper remarks of counsel. Under the first head it is argued there is a variance between the averments of the declaration and the proof, because the

charge in the declaration is, that plaintiff's buggy was struck by a freight train, in consequence of which he was thrown out and injured, and, as it is said, the proof is that the train was a passenger train, and that plaintiff was thrown from his buggy eighty feet from the crossing because his horse ran away. There is conflict of evidence concerning the character of the train. Some of the witnesses describe it as being composed of an engine, a box car and a passenger car, while still others testified it contained a baggage car only. In any case it could not be well classed as a passenger train, for the only use then being made of the engine was to switch the cars from one place to another upon the tracks; and if there was only the baggage car and the engine, as appellant insists, the descriptive words, "freight train," were more accurate than "passenger train" would be. Besides, as far as we are able to discover from the abstract, this precise point was not called to the attention of the trial court, and for this reason, as well as the one previously given, we are of the opinion the question of the supposed variance between the proof and the declaration is not available as reversible error in this court. It may be true, as appellant insists, that appellee did not fall out of the buggy until he was eighty feet away from the crossing, and that such fall was caused by the horse running away; but we are of the opinion the jury was warranted by the evidence in finding that the car was backed against the buggy while appellee was crossing the track, causing him to fall upon the side of it, and that the horse, being frightened, ran away. If this was true, the striking of the buggy by the car was the proximate cause of his having been thrown out and injured, and the averment of the declaration would thus be fulfilled.

Appellee arrived at the crossing while a freight train was passing to the north, and he waited there until the crossing was cleared, and then started to cross, when the engine with car attached backed upon the crossing from the opposite direction. We think the jury were warranted in finding from the evidence that appellant, under the circum-

stances, was negligent in causing its engine and cars to be rapidly backed upon the crossing from the opposite direction of the other train, just at the time when the latter had cleared the crossing, and this, too, without keeping a lookout to see if the crossing was clear of persons having the right to use the street. Ordinarily, we think, to back an engine and cars toward, and upon, a crossing, while another train is passing, tends to confuse persons waiting to cross over, and they are apt to be misled in believing the way clear when one train has passed, unless due care is used to give warning of the approach of the other; and in this respect we think the jury was warranted in finding that appellee, under the circumstances, had used due care. He stopped and there awaited the passing train, and his thought being upon that, instinctively started over the crossing when it was cleared, and for want of sufficient notice or warning of the approach of the switch engine with cars, was struck by it. We are of the opinion the appellant did not so manage its trains at the crossing at this point of time, with due care for the safety of persons rightfully upon the street. Due care required appellant to take notice that in consequence of its occupation of the street for the length of time necessary for a freight train to pass over it, others, who had an equal right to the crossing, would be waiting there, and it was its duty to use due and reasonable care to protect them from another train from the opposite direction. In the exercise of due care it is bound to know that to run its train in this manner over a crossing tends to the confusion of persons who are about to cross, and its care should be commensurate to the danger it produces. We are of the opinion the court properly refused to direct the verdict, and that the verdict is supported by the evidence in the case.

We find no prejudicial error in the instructions. It is objected to the second instruction given for the plaintiff, that it is inaccurate in its definition of ordinary care, as applied to the evidence, in that it limits the care required of the plaintiff to the situation in which he was then placed,

without also extending it to the care required in placing himself in such situation. We think the evidence does not warrant an inference that plaintiff was culpable in placing himself at the crossing, and this being the only situation the instruction could refer to, there could be no prejudicial error in correctly describing, or referring to it, as the instruction did. It is also objected that the fourth instruction directs the jury, in case they find for the plaintiff, to include in their verdict the necessary expenses incurred by the plaintiff in being cured of his injuries, because the declaration claims only for moneys paid out and expended. There may have been inaccuracy in this respect, but we are not of the opinion it ought to cause a reversal of the judgment. The remarks of counsel to the jury complained of, were indefensible, as well as reprehensible; but in view of the prompt suppression of them by the trial court, and its direction to the jury to disregard them, we can not say the jury was improperly influenced thereby.

The evidence tends to prove, and we think the jury was warranted in believing, that one of plaintiff's arms was permanently injured, and to the extent it would never be useful to him as a laborer, which the evidence showed he had been. This, together with the pain and suffering he had endured in consequence of his injuries, caused, as we think, by appellant's negligence, leads us to the conclusion that the amount of the judgment is not excessive.

Finding no reversible error in the record and proceedings of the trial court, its judgment will be affirmed.

Charles A. Nichols v. Ezra A. Shaw.

1. EVIDENCE—*Supporting a Verdict—Slander.*—The court after considering the evidence, instructions and rulings of the court, holds that the evidence supports a verdict.

Trespass on the Case, for slander. Appeal from the Circuit Court of Champaign County; the Hon. FRANCIS M. WRIGHT, Judge presiding.

Heard in this court at the May term, 1902. Affirmed. Opinion filed November 1, 1902.

A. J. MILLER, attorney for appellant; R. WRIGHT, of counsel.

F. M. GREEN & SON and GERE & PHILBRICK, attorneys for appellee.

MR. JUSTICE BURROUGHS delivered the opinion of the court.

This was an action on the case by the appellant, Charles A. Nichols, against the appellee, Ezra A. Shaw, to recover damages, which the former claimed he had sustained by reason of certain slanderous statements alleged to have been made of him by the latter. The appellee denied making the statements and the jury found a verdict in his favor, upon which the Circuit Court of Champaign County, where the case was tried, after having denied appellant's motion for a new trial, gave judgment.

The appellant prosecutes an appeal to this court from the judgment, and to effect a reversal thereof argues that the court erred in ruling upon the evidence and instructions, and that the verdict is not supported by the evidence.

We have carefully read and considered all the evidence and all the instructions and the rulings of the trial court complained of, and upon due consideration thereof, are of the opinion that the evidence supports the verdict, and that the rulings of the court are all fair and in accordance with the law of the case, and therefore the judgment ought to and will be affirmed.

Mr. Presiding Justice WRIGHT, having presided at the trial of this case in the Circuit Court, took no part in the decision of it in this court.

Mayor and City Council of the City of Roodhouse v. Mattie E. Briggs.

1. CITIES AND VILLAGES—*Act of May 10, 1901, in Regard to Disconnecting Territory from City.*—The act of May 10, 1901, makes it discretionary with the city council whether it will or will not disconnect territory from the city on the application of the owners thereof, and is applicable to judgments already rendered when the ordinance making the disconnection has not been passed and the cases in which such judgments have been rendered are pending in upper courts for review at the time said act was passed.

Mandamus.—Appeal from the Circuit Court of Greene County; the Hon. ROBERT B. SHIRLEY, Judge presiding. Heard in this court at the May term, 1902. Reversed. Opinion filed November 1, 1902.

ALFRED B. DAVIS, city attorney, and JOHN W. STARKEY, attorneys for appellants.

D. J. SULLIVAN, attorney for appellee.

MR. JUSTICE BURROUGHS delivered the opinion of the court.

This was a petition for a writ of mandamus, brought by Mattie E. Briggs against the mayor and city council of the city of Roodhouse, in the Circuit Court of Greene County, to compel them to pass an ordinance disconnecting certain territory belonging to her from the city. The Circuit Court awarded the writ and on appeal by the city to the Supreme Court the appeal was dismissed for want of jurisdiction in that court to entertain same before the case had been reviewed by this court and the mayor and city council now prosecute a writ of error out of this court to the Circuit Court to obtain a reversal of the judgment of the latter court.

After the judgment was rendered in the Circuit Court the general assembly passed the act of May 10, 1901, making it discretionary with the city council whether it would not disconnect territory on the application of the owners thereof.

In Vance v. Rankin, 194 Ill. 625, it is held that said act

of May 10th was applicable to judgments already rendered when the ordinance making the disconnection had not been passed and the cases in which such judgments had been rendered were pending in upper courts for review at the time said act was passed. (City of Charleston v. Wiley, 195 Ill. 433.)

What was said by the Supreme Court in the cases *supra*, is conclusive of the question in this case. The judgment of the Circuit Court will therefore be reversed.

Each party will pay his own costs in this court. (City of Charleston v. Wiley, *supra.*)

B. E. Blizzard v. Julius G. Epkens.

1. PRACTICE—*Extension of Time in Which to Present an Amended Affidavit of Merits.*—The application for an extension of time in which to present an amended affidavit of merits is addressed to the sound discretion of the court and unless that discretion has been abused, it will not be disturbed.

2. SAME—*Where Party May Have the Damages Assessed by a Jury.*—Section 41 of the practice act provides that in all suits in the courts of record in this state, upon default, either party may have the damages assessed by a jury. The words are imperative and not open to construction. A defaulted defendant, at any time before the damages are assessed by the court, is entitled, on asking it, to have his damages assessed by a jury, and the refusal of the court to grant his request is reversible error.

3. SAME—*Plea to Declaration Supported by Affidavit of Merits.*—Where, under Ch. 110, Sec. 87, R. S., the plaintiff supports his declaration with an affidavit of claim, defendant's plea must be supported by an affidavit of a meritorious defense.

Assumpsit, upon a promissory note. Appeal from the County Court of Tazewell County; the Hon. GEORGE C. RIDER, Judge presiding. Heard in this court at the May term, 1902. Reversed and remanded. Opinion filed November 1, 1902.

W. B. COONEY, attorney for appellant.

W. A. POTTS and O. A. SMITH, attorneys for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

The County Court of Tazewell County rendered judgment by default against appellant for $293.97 in a suit which appellee had brought upon a promissory note executed to him by appellant.

The amended special count declaring upon the promissory note and the common counts was supported by an affidavit of merits. Appellant filed a plea of *non est factum* verified, and other pleas, but filed with them no affidavits of merits. Three or four days thereafter, on November 4, 1901, he filed an affidavit, but one that was defective as an affidavit of merits. On the 9th of November the court struck the pleas from the files. Thereupon appellant moved the court to grant him until eleven o'clock A. M., November 11th, to file a sufficient affidavit of merits, and supported his motion by a lengthy affidavit of his attorney; but the court overruled the motion. Appellant then objected to the court assessing damages upon the declaration and affidavit of merits thereto attached without calling a jury to assess the damages. The court refused to call a jury to assess the damages and rendered judgment against appellant for $293.97, that being the amount named in the affidavit and the amount due on the note as principal, interest and attorney's fees.

A reversal of the judgment is urged because the court erred in striking the pleas from the files, in refusing appellant time in which to file an amended affidavit and in refusing to have the damages assessed by a jury.

The court properly ordered the pleas stricken from the files. Only the plea of *non est factum* was supported by a good affidavit, and that plea did not purport to answer the entire declaration. Had the declaration contained only the special count, the affidavit would have been sufficient; but it contained also the common counts, to which was appended the affidavit of appellee that his demand was for loaned money.

The application for an extension of time in which to present an amended affidavit of merits was addressed to the sound discretion of the court, and in view of the fact that

appellant first filed pleas without an affidavit and that he several days afterward filed an insufficient affidavit, we are not prepared to say that the court abused its discretion in refusing to grant two days in which to present a sufficient affidavit.

The court refused to call a jury to assess the damages. Section 41 of the practice act provides that "In all suits in the courts of record in this state upon default * * * either party may have the damages assessed by a jury." The words are imperative and not open to construction. A defaulted defendant, at any time before the damages are assessed by the court, is entitled, on asking it, to have his damages assessed by a jury and the refusal of the court to grant his request is reversible error. Pinkel v. Domestic Sewing Machine Company, 89 Ill. 277. It is contended by appellee, however, that no sufficient request for a jury was made by appellant. It is hypercritical to say that no request was made for a jury to assess the damages. Appellant specifically objected to the court's assessing the damages or to entering judgment without calling a jury to assess them, and the trial judge makes the bill of exceptions recite that the court refused to impanel a jury to assess the damages. To all intents and purposes there was a request for a jury and the court evidently so understood it. There is nothing in the contention that appellant was not entitled to a jury for the reason that he did not apply for it at the first day of the term as provided by section 200 of chapter 37, entitled "Courts." The provision therein contained is applicable only to cases pending at a term where no jury has been summoned. For this error, the judgment will be reversed and the cause remanded.

Robert Munsell v. The City of Carthage.

105 119
f105 123
105 119
a203s 474

1. INTOXICATING LIQUORS—*Ownership When Sent C. O. D. by Express.*—When liquor is delivered by the seller to the carrier nothing remains to be done by the seller; the sale is complete; he retains merely a lien for the price. The property rests in the buyer, although he can not obtain possession until he pays the price.

2. SALES—*Delivery of Goods to Carrier Vests Title in Vendee.*—As a general rule, where the terms of sale have been agreed upon, the delivery of goods to a common carrier to be conveyed to the vendee is equivalent to a delivery to the vendee, and vests the title in him.

3. ORDINANCES—*Declaring That a Nuisance Which is Not a Nuisance.*—An ordinance which declares that a nuisance which is not a nuisance is unreasonable and void.

Debt, for violation of an ordinance. Appeal from the Circuit Court of Hancock County; the Hon. JOHN J. GLENN, Judge presiding. Heard in this court at the May term, 1902. Reversed and remanded. Mr. Presiding Justice WRIGHT, dissenting. Opinion filed November 1, 1902.

WILLIAM H. HARTZELL, attorney for appellant.

ALVA A. KELLEY, city attorney, for appellee; A. W. O'HARRA, and BERRY, MCCRORY & KELLEY, of counsel.

MR. JUSTICE HARKER delivered the opinion of the court.

Appellant, as agent of Adams Express Company at Carthage, Illinois, received packages of intoxicating liquor which had been ordered by divers residents of that place from A. Hubner & Co., wholesale liquor dealers at Burlington, Iowa. The packages contained less than five gallons and were delivered to the express company at Burlington by Hubner & Co., C. O. D., in accordance with contracts theretofore made between the consignees and the traveling salesman of Hubner & Co. Appellant was in no wise interested in the liquor or the profits of sale, and all that he did was to receive the packages, deliver them to the consignees, collect the C. O. D. charges and remit to Burlington. He was convicted and fined under an ordinance of the city of Carthage, which declares that it is unlawful and a nuisance for an express company or other common carrier, or its agents, to deliver to any consignee within the city intoxicating liquors in less quantity than five gallons, in all cases where the collection of the purchase price or any part thereof for remittance to the consignor is made a condition precedent to or contemporaneous with the delivery. The ordinance declares that such delivery shall be deemed a sale of intoxicating liquors within the meaning of the ordinance forbidding the sale of liquors within the city limits and

shall subject an express company or its agent so delivering to a fine of not less than $20 nor more than $100 for each offense.

The question presented by this appeal is not a new one to this court. In Breckwald v. The People, 21 Ill. App. 213, a case wherein intoxicating liquors were shipped from one county to another C. O. D., and the question for decision was whether the sale was consummated in the county from whence the goods were consigned or in the one to which they were consigned, Justice Wall, speaking for the court, said:

"When the liquor was delivered to the carrier, nothing remained to be done by the seller; the sale was complete; he retained merely a lien for the price. The property rested in the buyer, and while he could not obtain possession until he paid the price, his right was perfect to have the property when the price was paid. The vendor could not withdraw from the bargain, and though the value of the liquor might advance, he could receive only the price fixed. If there was an accident, the loss would fall on the vendee; In a word, it was his property, subject only to the lien for the price."

We have approved the doctrine therein announced in the Village of Coffeen v. Huber, 78 Ill. App. 456; in Clancey v. The People, 99 Ill. App. 303; and in Jones v. The People, 99 Ill. App. 305.

As a general rule, where the terms of sale have been agreed upon, the delivery of goods to a common carrier to be conveyed to the vendee is equivalent to a delivery to the vendee and vests the title in him. Benjamin on Sales, Sec. 362; Pike v. Baker, 53 Ill. 166; Ward v. Taylor, 56 Ill. 495; Ellis et al. v. Roche et al., 73 Ill. 281; Krulder v. Ellison, 47 N. Y. 36; Foster v. Rockwell, 104 Mass. 167; Odell v. B. & M. R. R., 109 Mass. 50. We are unable to see why the mere fact of the consignor's shipping the goods C. O. D. should constitute an exception to the general rule. In some jurisdictions there is a disposition to make a sale of liquor C. O. D. an executory contract, and so it has been held for the purpose of determining whether the seller has violated the liquor laws in force where the buyer

lives, that a sale C. O. D. is not complete until delivery, acceptance and payment of the price by the person ordering the liquors. But the weight of authority is against that view, and it is generally held that where intoxicating liquors were ordered to be shipped C. O. D. the sale is complete when the liquor is delivered to the common carrier. State v. Moffit, 73 Me. 278; Commonwealth v. Fleming, 5 L. R. A. (Supreme Court of Pennsylvania) 470; Pilgreen v. State, 71 Ala. 368; State v. Carl & Tobey, 43 Ark. 353; Crook v. Cowan, 64 N. C. 743; State v. Flanagan, 38 W. Va. 53.

Holding as we do, then, that the sales of liquor were complete at Burlington, Ia., and that title passed to the respective purchasers when delivered to the express company, appellant became the bailee of the purchasers when the packages reached him at Carthage and could not be convicted of unlawful selling. The city council of Carthage has no power to make that a sale which in fact is not a sale. Neither has it authority to declare that a nuisance which is not one in fact. An ordinance which so declares is unreasonable and invalid. Dillon on Mun. Corporations, 374; Town of Lake View v. Letz, 44 Ill. 31; North Chicago Ry. Co. v. Town of Lake View, 105 Ill. 207; Village of Des Plaines v. Poyer, 123 Ill. 348; Yates v. Milwaukee, 10 Wallace, 505.

What we have said in reference to sales and shipments made by Hubner & Co. from Burlington, Ia., applies to sales made at Covington, Ky., and shipments made from there. The acts of appellant were identical in each case. The propositions of law held by the court in behalf of appellee were erroneous and appellant was unlawfully convicted. The judgment will be reversed, but the cause will not be remanded.

Mr. Presiding Justice WRIGHT dissents.

The City of Carthage v. W. H. Duvall.

Debt, for violation of an ordinance. Appeal from the Circuit Court of Hancock County; the Hon. JOHN A. GRAY, Judge presiding. Heard in this court at the May term, 1902. Affirmed. Mr. Presiding Justice WRIGHT, dissenting. Opinion filed November 1, 1902.

ALVA A. KELLEY, city attorney, for appellant; A. W. O'HARRA and BERRY, MCCRORY & KELLEY, of counsel.

W. H. HARTZELL, attorney for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

This was an action of debt brought by the City of Carthage against appellee for an alleged violation of an ordinance of the city prohibiting the selling of intoxicating liquor within the city. Appellee was the agent of the Adams Express Company at Carthage, and the alleged violation consisted of receiving packages "C. O. D.," delivering them to the consignees, collecting from them and remitting to the consignors. The case was tried by the court on an agreed state of facts, resulting in a finding and judgment for appellee. The case is identical, as to the facts, with the case of Robert Munsell v. The City of Carthage, opinion filed at this term of court. It was tried by a different judge, however, and a different result was reached. As the judgment harmonizes with the views expressed in the opinion already filed (which need not be here repeated), the same will be affirmed.

Mr. Presiding Justice WRIGHT dissents.

Gillespie Home Township Mutual Fire Ins. Co. v. Asberry Prather.

105 123
a202s 234

1. INSTRUCTIONS—*Where the Evidence is Conflicting.*—Where the evidence on a pivotal point is in conflict it is important that the instructions should be correct.

2. SAME—*Leaving Out Element of Authority of Officer to Act.*—An

instruction which tells the jury that a contract of insurance was entered into, if they believe from the evidence that the secretary of the company accepted plaintiff's application and membership fee and told plaintiff that a policy of insurance would be executed and delivered to him in some way, is vicious, because it omitted the element of his authority to pass on an application and issue a policy.

Assumpsit, on a policy of fire insurance. Appeal from the County Court of Macoupin County; the Hon. DAVID E. KEEFE, Judge presiding. Heard in this court at the May term, 1902. Reversed and remanded. Opinion filed November 24, 1902.

BELL & BURTON, attorneys for appellant.

PEEBLES & PEEBLES, attorneys for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

This suit was brought by appellee against appellant to recover for the loss, by fire, of certain household furniture, which, it is claimed, was covered by a parol contract of insurance. It was defended upon the ground that the contract was never consummated. A trial by jury resulted in a verdict and judgment in favor of appellee for $266.65.

Appellant is a township fire insurance company, doing local mutual insurance. Samuel J. Williams is president and E. T. Rice is secretary of the company. Both reside on farms, but have a place in the village of Gillespie, where they transact business. Appellee desired a policy of insurance for $400 placed upon his household goods. He had several interviews with Rice, who was disinclined to take the risk, because appellee placed too high an estimate on the value of the goods. On September 13, 1901, however, Rice took his written application for $400 insurance, and promised to submit it to the president, agreeing to leave the policy, if issued, at a store near by. On the 16th of September, Williams, the president, went to the office and found the application and policy ready for his signature. After conferring with Rice he refused to accept the application or sign the policy. On the 20th Rice endeavored to find appellee and notify him of the rejection of his application, and to return him the membership fee of $2.40

which appellee paid on the 13th, but appellee had gone with his family on a visit to an adjoining county. That night his house and all its contents were burned.

The only frictional question involved in the controversy is whether there was an acceptance of appellee's application, and that depends upon the authority of Rice, the secretary. The extent of his authority was in dispute. According to his testimony and that of Williams, each application had to be passed upon by the president. Of course, the signature of the president to a policy is not indispensable. If the rules and customs of the company required the president to pass upon the application, his oral acceptance, or conduct of his by which such acceptance could be reasonably inferred, would be sufficient to bind the company; but some kind of acceptance on his part would be necessary. It was the contention of appellee on the trial that the secretary had the right to accept the application and issue the policy. There was testimony tending to support that contention. In view of the fact that the authority of Rice was in dispute, it was highly important for the instructions on that point to be correct. In the third instruction, given for appellee, the court told the jury that a contract of insurance was entered into if they believed from the evidence that Rice accepted Prather's application and membership fee, and told Prather that a policy of insurance would be executed and delivered to him in some way. The instruction was vicious, because it omitted the element of his authority to pass on an application and issue a policy. Appellee's fourth instruction should have been refused upon the ground that there was no count in the declaration on which to base it. Nor do we think the evidence justified such an instruction.

For the error of the court in giving these two instructions the judgment will be reversed and the cause remanded.

105 126
a202s 486

Christopher & Simpson Architectural Iron & Foundry Co. v. M. Yeager and Phil. Yeager, Partners, Doing Business as M. Yeager & Son.

1. CONTRACTS—*Defaulting Party Liable for Increased Cost of Obtaining the Material Elsewhere.*—Where a company contracts to furnish iron by a certain time, and defaults, it is liable to the other contracting party for any increased cost of obtaining material elsewhere on short notice to take the place of that ordered from the defaulting company.

Assumpsit.—Appeal from the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge presiding. Heard in this court at the May term, 1902. Affirmed. Opinion filed November 24, 1902.

JAMES W. & EDWARD C. CRAIG, attorneys for appellant; H. M. STEELY, of counsel.

E. R. E. KIMBROUGH and J. H. LEWMAN, attorneys for appellees.

MR. JUSTICE BURROUGHS delivered the opinion of the court.

This was an action of assumpsit brought in the Circuit Court of Vermilion County on July 30, 1901, by the appellees, M. Yeager and Phil. Yeager, partners, doing business under the firm name of M. Yeager & Son, at Danville, Illinois, against the appellant, Christopher & Simpson Architectural Iron and Foundry Company, a corporation having its office and shop at St. Louis, Missouri, to recover for the amount which the steel material mentioned in a certain contract between the appellees and the appellant cost the appellees over and above the price at which the appellant had agreed in said contract to furnish the same but neglected to do so, as provided therein.

The contract sued upon is as follows:

"This agreement, made the 30th day of October, 1901, between M. Yeager and Phil. Yeager, doing business under the firm name of M. Yeager & Son, of Danville, Illinois, party of the first part, hereinafter designated the contractors, and Christopher & Simpson, of St. Louis, Missouri, hereinafter designated the subcontractors.

Article 1. The subcontractor, under the direction of the contractors or their authorized foreman, and to the acceptance of the supervising architect of the United States Treasury Department at Washington, D. C., or his representatives, agrees to furnish the first floor beams, ceiling, roof beams, channel tees, columns and furrying around columns, trusses, channel frames for doors, beam girders over windows, tie rods, separators, and anchors for beams, all to be done in strict accordance with the plans and specifications as prepared by the supervising architect of the United States Treasury Department, Washington, D. C.

Art. 2. Subcontractors shall begin their work at once, and shall complete and deliver the same in first-class condition, all marked ready to set F. O. B. cars at Elgin, Ill., not later than the 20th day of April, 1901.

Art. 3. Should the subcontractors fail to provide the material mentioned therein on the date mentioned above, contractors may, after five days written notice sent to the subcontractors, provide such material and deduct the cost thereof from any moneys due or to become due the subcontractors under this agreement; or if in the contractors' judgment the failure of the subcontractors as above, is sufficient action, they may, at the expiration of the above notice, terminate the employment of the above subcontractors and relet the work on the best terms offered at the expense of the subcontractor, charging him with the amount of all expenses so incurred, crediting him with the amount herein agreed on final settlement of this agreement.

Art. 4. For the materials herein mentioned the contractors are to pay to the subcontractors two thousand nine hundred dollars ($2,900), payments to be made every thirty days, based on the estimates made by the supervising architect or his authorized representative, less ten (10) per cent, which will be retained until the final acceptance of the material mentioned herein by the supervising architect or his authorized representative."

The appellant pleaded *non-assumpsit* and a set-off of $510 for shop drawings, which it claimed to have furnished to the appellees at their request. The appellees traversed the plea of set-off, and the case was tried by jury and resulted in a verdict and judgment in favor of the appellees for $1,480.62.

The appellant, having moved for a new trial and it being

denied, brings the case to this court by appeal, and to reverse the judgment its counsel argue for error that the court admitted improper evidence; refused to admit proper evidence; gave an improper instruction; refused proper instructions; improperly modified proper instructions and as modified, gave them; that the verdict and judgment are not supported by the evidence and the law applicable thereto, and that the damages assessed are excessive.

It appears that the contract sued on was reduced to writing and signed by the parties on January 9, 1901, but that it was entered into on October 30, 1900.

The specifications referred to in the contract provide: (1) That shop drawings in triplicate of the steel material for the building and conforming to the office drawings and specifications, must be submitted and approved before any work referred to by such drawings should be done; (2) that all steel material must be made of "Open Hearth Steel;" and (3) that the steel material must be submitted to the United States inspectors for inspection and approval both at the mill and at the shop.

Shortly after the contract was signed by the parties, the appellant, without any opportunity for inspection and before shop drawings were submitted and approved, had sent from the mill to its shop in St. Louis, "Bessemer Steel" material instead of "Open Hearth Steel," from which to make the steel work which it had agreed to furnish for the post-office building, and it did not submit the shop drawings mentioned in the contract until after repeated requests therefor by the appellees, and not until the time limit in the contract for the material to be delivered, had nearly been reached.

The correspondence through the mail between the officers of the appellant and the appellees after the contract was signed, clearly shows that the parties themselves fully understood that the shop drawings were to be furnished by the appellant and not by the appellees, and when they were finally so furnished, the United States inspectors mentioned in the contract, at once inspected the material at appellant's

shop, and ascertaining that it was "Bessemer Steel" instead of "Open Hearth Steel," declined to approve it for the Elgin post-office, and so informed the officers of the appellant and the appellees. The appellant then requested the appellees to extend the time in which the appellant should furnish the steel material mentioned in the contract, but the appellees declined, for the reason that to do so would render them unable to complete the building within the time limited for them to finish it, default of which would cause them to incur a heavy penalty for each day after such limit had been reached and the building remained unfinished.

Failing to get the time limit in which to deliver the steel material extended, appellant declined to do anything further toward furnishing same, and the appellees, on May 24, 1901, notified the appellant in writing, that unless it furnished said material on or before June 1, 1901, they would obtain same and charge the additional expense therefor, to it. The appellant failing to furnish the material mentioned in the notice, the appellees bought it at an additional cost above the contract price of $1,480.62, some of which additional cost was occasioned on account of appellees requiring it to be furnished on short notice.

To procure the material in question quickly, the appellees obtained some of it of a slightly different size and weight than that specified in the plans and specifications in question, but such difference did not add anything additional to the cost thereof.

By the rulings on the evidence and instructions, the trial court, in effect, refused to allowed the appellant anything for the shop drawings, and allowed the appellees for the additional cost of the material, and the principal contention of counsel for the appellant is that their client should have been allowed for the shop drawings and should not have been charged with so much of the increased cost of the material as was occasioned by causing it to be delivered in such a short time after it was ordered.

But in that view we can not concur, for the reason that

by the correspondence of the parties, it appeared that they both construed the contract as meaning that the appellant should furnish such shop drawings, and the court therefore properly refused to allow the appellant to charge the appellees therefor; and it was also proper to allow the appellees to recover the additional cost of the material, occasioned by its being required to be speedily furnished, for the reason that when the appellant agreed to furnish the material by April 20, 1901, its officers knew that the appellees would be subjected to extra costs by way of a penalty unless the appellant would furnish the material promptly at or before that time, to enable the appellees to finish the building within the time they agreed to, under a penalty, and the appellant having defaulted in so furnishing the material, without fault on the part of appellees, it, and not they, must bear the reasonable consequence thereof.

The other minor contentions of counsel for the appellant will not be referred to for the reason that in our opinion the trial had and conclusion reached in the Circuit Court in this case, are shown by the record to have been fair to both parties, and therefore the judgment should and will be affirmed.

Fred Walkau v. Manitowoc Seating Co.

1. PROMISSORY NOTES—*Purpose for Which Given.*—Whether promissory notes are given to release or abrogate a precedent contract is a question of fact for the jury.

2. CAVEAT EMPTOR—*Applies to Judicial Sales.*—The rule of *caveat emptor* applies to all judicial sales.

3. SALES—*Seller Reserving Title to Property May Assert it at Any Time.*—A seller reserving the title to the property on a sale until consummation thereof by the buyer may assert his title at any time when the rights of a judgment creditor or an innocent purchaser have not intervened to prevent the same.

Replevin.—Appeal from the Circuit Court of McLean County; the Hon. COLOSTIN D. MYERS, Judge presiding. Heard in this court at the May term, 1902. Affirmed. Opinion filed November 1, 1902.

FRANK B. MCKENNAN and WELTY & STERLING, attorneys for appellant.

LIVINGSTON & BACH, attorneys for appellee.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

Appellee began its action of replevin against appellant and caused the writ to be levied upon a lot of opera chairs, in three counts of the declaration alleging its property in the chairs; and pleas of general issue and of property in appellant were filed. Upon a trial of the issues by jury, the verdict and the judgment of the court were entered against the appellant for a return of the property and for $41 as damages; and the court having overruled appellant's motion for a new trial he prosecutes this appeal to effect reversal of such judgment, and it is argued that the court admitted improper evidence, erred in its instructions to the jury and that the verdict is not supported by the law and the evidence.

The evidence discloses that the Bloomington Coliseum Association, incorporated, bought of appellee an outfit of opera chairs for use in its building, and a written contract was executed by them, November 18, 1898, providing that appellee should supply the chairs ready for use on board cars at Bloomington on or before December 22, 1898; that the Coliseum Association should advance the money for transportation charges, for drayage and for setting up the chairs, and should pay the balance of $1,200, the consideration, one-third cash, thirty days after chairs were received, one-third in three months and the remainder, less $100, six months after receipt of goods, deferred payments to bear interest at six per cent from maturity; and a non-negotiable note for $100 payable two years after date with six per cent interest at the bank in Bloomington. The instrument further provided that the furniture described should remain the property of the appellee until fully paid for as specified, this being the contract produced by appellee. Appellant also, upon the trial, produced a like instrument, duplicating

that of appellee, except that it expresses an agreement for payment to appellee of the $1,200 upon completion of the work, or to settle for same upon completion by negotiable notes as follows: proceeding to duplicate the other in the matter of payments; and upon the back of the instrument produced by appellant appears an indorsement over the name of appellee, by Murphy, its manager, to the effect that appellee had received in November, 1899, from the Coliseum Association, three promissory notes for $200, $200 and $300 respectively, in full settlement of the balance on the "within contract." There was a controversy at the trial as to whether the part of the instrument offered by appellant omitted from the instrument offered by appellee was a part of the real contract. Robinson, secretary of the Coliseum Association, testifies that he drew the instruments at the dictation of Hubbard, appellee's agent, and that the one produced by appellee was the original and the one produced by appellant was copied from it; and Murphy, manager for appellee, testifies that the instrument was in his possession and control continuously, and that it was not changed nor interlined. This testimony was uncontradicted by any proof in the case and it was for the jury to say from all the evidence which instrument correctly described the contract in controversy. The jury seems to have considered appellee's instrument as correct; and we can not say they were unwarranted in so doing; the verdict is therefore decisive of that question.

The chairs were delivered by appellee and set up by the Coliseum Association and evidence is introduced tending to show that the chairs were considered satisfactory at first, but it was discovered by the Coliseum Association that the chairs needed certain other fixtures, and for this reason the association declined settlement with appellee until such fixtures were furnished. The negotiations concerning this adjustment were carried on until November 11, 1899, when the fixtures were furnished and a payment of $337.41 was made in cash to the appellee, and three notes, as designated, were given to appellee in settlement, as it is contended, of the balance of the purchase price of the chairs, less a dis-

count allowed by appellee during the negotiations, and it is the receipt for these notes that appears indorsed upon the back of the instrument produced by the appellant as the contract of purchase. Appellee contends that it did not agree to and did not in fact accept these notes and release the contract, but that the notes were collateral; and if in truth it did not, such contract would not be so released or abrogated. At a meeting of the directors of the Coliseum Association on October 12, 1899, the secretary was directed to execute these notes to the appellee for the company, and upon the receipt of the needed fixtures from appellee, to deliver the notes to it in full settlement of the contract. This action appears to have been voluntary on the part of the association, and the burden is upon appellant to show that its action was accepted by appellee or reciprocated by it in some manner binding as a release of the association from the obligations of its contract. Whether or not this was accomplished was a question for the jury; and it is only our province to discover whether the jury were warranted in finding, as they did, that no such release of the contract was effected. In the first place it does not appear that any such action as the execution and delivery of these notes was requested or sought by appellee. In the second place appellee dealt with the notes as testified by Murphy, who said that on receiving notice that the notes were at the bank he went there and the notes were handed him, together with another paper on which he was directed to sign a receipt for the notes. This he hurriedly signed without reading; and as it appears, is the indorsement on the duplicate contract mentioned and offered by appellant. Then taking the notes, he indorsed upon them in effect that they were secured by the contract with the Coliseum Association, pinned them to appellee's contract and laid them away. From these circumstances we can not say the jury was not warranted in the conclusion that the contract was not released and abrogated by these notes; and we consider the determination of the jury decisive of that question. Archibald v. Argall, 53 Ill. 307. And the mere

giving and acceptance of the notes is not conclusive evidence that all demand upon the contract was settled. Wheelock v. Berkeley, 138 Ill. 153, and cases cited.

Appellant was a director of the Coliseum Association during the time the negotiations were pending and conferred with appellee concerning these notes and the contract. In various meetings of the board of directors attended by him the matters were discussed, correspondence was read and action thereon taken by the directors; and he was there when the notes were ordered to issue. From all the circumstances in evidence, including the fact that appellant did not deny the knowledge of the various transactions and of appellee's claim, we think the jury were warranted in finding that appellant was either in actual knowledge of the facts in controversy or that he was so put on inquiry as to be bound the same as if he knew them; he could have ascertained them by proper inquiry. A creditor of the Coliseum Association having obtained judgment upon his debt, the property in controversy was levied upon by execution and offered for sale, and the same was purchased and reduced to possession by appellant and a portion of the property was sold by him, of the value, as the jury found, of $41. The remainder of this property was taken by the writ of replevin. If appellee had the rights claimed in this property they were not cut off by the sheriff's sale, unless the sale was made to the execution creditor or some other person in the capacity of innocent purchaser; for the rule of *caveat emptor* applies to all judicial sales (Tilley v. Bridges, 105 Ill. 336), and the finding of the jury that appellant was not an innocent purchaser at that sale, but that he became such purchaser with knowledge, or chargeable with it, of the appellee's claim, we think was warranted, and conclusive upon appellant; and so the question of what would be done were he an innocent purchaser does not arise.

But it is insisted that the levy of the execution of the judgment creditor vested a property right in the creditor (who was such without notice of appellee's claim) so that a

sale under the execution to one having notice of appellee's claim would be protected the same as if the sale was made to such execution creditor himself. To hold this to be the law would do violence to the rule as we understand it. While the execution creditor is so far protected that the property, if once reduced to his possession by the sale to himself under his own execution, is discharged of an adverse claim of which he had no notice, so that one in possession of knowledge of the adverse claim, or chargeable with it, may take the property so discharged, it is unnecessary to say, and we do not understand that the authorities go so far as to hold, that without the intervention of title in some one who is an innocent purchaser, the other may stand in his place cleared of the notice. Appellant was in no sense compelled to buy at the execution sale. Indeed, had he not done so, no doubt is entertained the execution creditor would have bid it in and taken the property when it could have been purchased by appellant freed from appellee's claim. In the manner of the transaction we can not escape the conclusion that appellant took the property subject to the claim of appellee, if that is a valid claim.

Numerous authorities are presented by appellant upon the proposition that the reservation of title to the seller in a contract of sale of personal property until the buyer shall complete the terms of sale, and where the buyer is invested with *indicia* of ownership, will not operate to the benefit of the seller against creditors or innocent purchasers; and that to retain his lien to the exclusion of such creditors or purchasers the seller must either retain possession or secure his lien by chattel mortgage. That such is the well-settled rule admits of no doubt. But no rights of creditors, except those of appellee and the Coliseum Association, are involved in this suit, and the appellant is effectively found to be no innocent purchaser. We have carefully examined the authorities presented and others, and are compelled to say that we can not find support for the position of appellant on this question. St. Louis Iron and Machine Co. v. Kimball, 53 Ill. App. 636, and Gilbert

v. Gere, 67 Ill. App. 590, are among those presented by appellant. In the first an execution creditor upon a sale under his execution took the property, and the appellant was held to lose its lien for unpaid purchase money on the same thereby, even though the creditor had some knowledge of the contract of sale and the reservation of the lien. In the second case also, a judgment creditor bought the property at sale under his execution, and again it was held that the lien of the seller was lost against such creditor, even though an agent of the creditor had information that some person, not disclosed, had or claimed a lien on the property. But here appellant occupies no such ground as a creditor, and as we have before said, a very different question is presented by the rights of such creditor, the law as to such creditor's rights being well defined and distinct. It has been held in effect, in Hooven, etc., Co., v. Burdette, 153 Ill. 672, that a seller reserving the title to the property on a sale until consummation thereof by the buyer, may assert his title at any time when the rights of a judgment creditor (or an innocent purchaser) have not intervened to prevent the same. We think that in this case no such rights have intervened and that the lien of appellee is capable of attaching to the property as against the appellant; it was no secret to him.

We have carefully examined the rulings of the court on the admission and rejection of evidence and its rulings on the instructions complained of, and are constrained to say that no prejudicial error occurred in either.

Finding no reversible error the judgment of the Circuit Court is affirmed.

---

105 136
a202s 206

Chicago & Alton R. R. Co. v. Thomas D. Hogan.

1. CONVEYANCES—*How Construed.*—Deeds are construed most favorably to the grantee.

2. SAME—*What the Consideration is Presumed to Include.*—Where land is conveyed to a railroad company, the consideration is presumed to include not only the value of the land actually conveyed, but also

compensation for all damages that might arise to the grantor's adjoining lands from the use of the premises conveyed in operating the grantee's railroad with a single or a double track. The original grantor could not maintain an action for damages occasioned by the laying of the second track, were he still the owner of the adjoining lands, nor can his remote grantee, who holds title under the same conditions.

3. CONDEMNATION — *Extension of Street Across Railroad — What Rights the City Acquires.*—In a proceeding by a city against a railroad company to condemn a part of its right of way for the extension of a public street across it, the city can acquire only a joint right with the railroad company to the use of the land condemned. The use by the public will be subject and subordinate to the right of the railway company to use it for the purposes embraced within its charter. By the judgment of condemnation the city and public will acquire only a mere easement to cross and pass over the right of way and tracks. The railway company will not therefore be deprived of its right to lay additional tracks. It may lay as many additional tracks upon its right of way as its increase of business may require, and the only duty resting upon it is to keep that portion occupied by the street free and open to the use of the public as a street.

4. DEDICATION—*Of a Public Street Across a Railroad Right of Way —What Rights Public Takes.*—Where there is a dedication of a public street across a railroad right of way the public takes subordinate to the rights of the railroad company.

Trespass on the Case.—Damages by laying of second track on railroad right of way. Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge presiding. Heard in this court at the May term, 1902. Reversed. Opinion filed November 24, 1902.

Appellee brought this suit to recover damages against appellant for laying down a railroad track along its right of way across Fourth street in the city of Springfield, in front of appellee's property, whereby the ingress to and egress from it was impaired. To the declaration the general issue was filed and the cause was submitted to the court without a jury upon an agreed state of facts, together with evidence as to the amount of damages suffered by appellee. The stipulation of facts is in substance as follows:

The Alton and Sangamon Railroad Company, of which corporation the appellant is the successor in title and interest, was incorporated by act of the legislature in 1847, and was authorized to acquire the fee simple title to a right of way wide enough for a single or double track.

Pursuant to this authority a strip sixty feet wide was acquired through a tract then owned by one Lewis Kirsch by grant from Kirsch, describing the strip as "all that part of the above described tract of land that lies within thirty feet of the center of said railway as said center line runs through or over the above described premises, said strip containing one and two-tenths acres, more or less."

After the grant from Kirsch and the laying down of a single track on the strip, the original tract was subdivided and by a series of mesne conveyances the appellee acquired title to a portion of the original tract owned by Kirsch by a deed from the master in chancery of Sangamon county, dated March 2, 1897, which deed conveys lands described as follows:

"Part of the northwest quarter of section twenty-seven, township sixteen north, range five, west of the 3rd P. M., in the county of Sangamon, in the State of Illinois, bounded as follows:

Beginning at a point on the west line of Fifth street in the city of Springfield, Illinois, 1,091.37 feet north from the south line of said quarter section, and running thence west 160 feet, thence south 47 feet, thence west 160 feet to the east line of Fourth street, thence north with the east line of Fourth street to the right of way of the Chicago and Alton Railroad, thence northeasterly with said right of way to the south line of lands sold by Henry M. Lewis and wife to Henry Thoma, said land being 1,131.37 feet from the south line of said quarter section, thence east with said Thoma's line to the west line of Fifth street, and thence south fifty feet to the place of beginning."

The right of way of appellant, by which the conveyed premises are partially bounded, runs in a northeasterly and southwesterly direction. Fourth street, which is mentioned in the deed as the western boundary of the tract, runs north and south and across the right of way of appellant at an angle of approximately twenty degrees. Fourth street was never regularly laid out, but was extended across the right of way about 1869, and has been open for travel across such right of way since that time. Appellant has never received any compensation for the portion of its right of

way across which Fourth street extends, either by itself or its predecessors, nor did it or its predecessors ever join in an express grant or plat thereof for highway purposes.

In May, 1901, appellant laid down an additional main or second track on the said right of way, about ten feet west of the easterly right of way line, which is the northwesterly line of appellee's premises.

The court found for appellee and assessed his damages at $380, and after overruling a motion for a new trial, rendered judgment against appellant for that sum and costs.

PATTON, HAMILTON & PATTON, attorneys for appellant; WILLIAM BROWN, of counsel.

MCGUIRE & SALZENSTEIN, attorneys for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

The main contention of appellee is that he is entitled to recover for any damage to his property occasioned by the laying of the additional track, regardless of the fact that appellant acquired title to the ground by deed from Kirsch and wife, for the reason that the additional track was laid at a place which had become, since the delivery of the Kirsch deed, a public street in the city of Springfield.

Incidentally, it is argued that even if the street had never been opened, appellee, under the terms of the Kirsch deed, would not be precluded from recovering for damages occasioned to his property by the laying of the additional track, but in our view that point is not worthy of any very extended discussion in this opinion. True, the deed does not, in express terms, state that the conveyance was for railroad purposes, but it was made to a corporation authorized by its charter to acquire land on which to construct a single or double track railroad; it conveys a long narrow strip of land, and when construed in the light of the circumstances surrounding its execution it is clearly manifest that the purpose of the grant was to enable the grantee to construct tracks and operate a railroad over the land. If it were a case of doubt or ambiguity a familiar

canon of construction would require the deed to be construed most favorably to the grantee. Alton v. Ill. Trans. Co., 12 Ill. 38; Price v. McConnell, 27 Ill. 255; Cottingham v. Parr, 93 Ill. 233; Sharp v. Thompson, 100 Ill. 447. Kirsch is conclusively presumed to have received in the consideration paid him, all the damages to the land adjoining the strip, past, present and future. The consideration is presumed to include not only the value of the land actually conveyed, but also compensation for all damages that might arise to his adjoining lands from the use of the premises conveyed in operating the grantee's railroad with a single or a double track. Kirsch, therefore, could not maintain an action for damages occasioned by the laying of the second track, were he still the owner of the adjoining lands, nor can this remote grantee, who holds title under the same conditions. C. R. I. & P. Ry. Co. v. Smith, 111 Ill. 365. It follows, then, that the judgment must be sustained, if at all, upon the theory that appellee acquired a right to use appellant's right of way by reason of Fourth street being laid out across it by the city of Springfield. Upon this line of contention appellee assumes that he is entitled to damages on account of the facilities for ingress and egress being diminished by the laying down of the second track, because a public street has become established across the right of way. In other words, the proposition is that an abutting property owner who has no right of action on account of the laying down of the additional track prior to the opening of the street across the right of way, becomes invested with a new right by the opening of such street.

As a matter of fact no condemnation proceeding was ever instituted against appellant for the extension of Fourth street by the city over the right of way; no compensation has ever been paid therefor, and, so far as the record shows, appellant has never joined in any grant or plat of Fourth street. Inasmuch, however, as appellant has without objection permitted the use of the strip as a street since 1869, we shall consider appellee's right as

though a judgment of condemnation had been regularly rendered.

In a proceeding by a city against a railway company to condemn a part of its right of way for the extension of a public street across it, the city can acquire only a joint right with the railway company to the use of the land condemned. The use by the public will be subject and subordinate to the right of the railway company to use it for the purposes embraced within its charter. By the judgment of condemnation the city and public will acquire only a mere easement to cross and pass over the right of way and tracks. The railway company will not, therefore, be deprived of its right to lay additional tracks. It may lay as many additional tracks upon its right of way as its increase of business may require, and the only duty resting upon it is to keep that portion occupied by the street free and open to the use of the public as a street. I. C. R. R. Co. v. Chicago, 138 Ill. 453; I. C. R. R. Co. v. Chicago, 141 Ill. 586; C. B. & Q. R. R. Co. v. Chicago, 149 Ill. 457; Harris v. Chicago, 162 Ill. 288.

As before remarked, Kirsch is presumed to have received compensation for injury to his adjoining lands resulting from the use of the right of way conveyed for railroad purposes, no matter what the subsequent situation of the lands remaining in his possession might become. The extension of the street through the lands and over the right of way as well as any other change in condition must be presumed to have been in contemplation when the deed was made. It can not be held that his grant excepted damages that might arise from the subsequent establishment of a street and the laying of additional tracks any more than it did any other damages. Having bartered away his right to damages growing out of the use of the right of way for railway purposes he can not be re-invested with such a right by the acquisition of an easement by the public to travel over the right of way. Appellee stands in the place of Kirsch and can not be heard to complain of an act authorized by Kirsch's deed. He bought the property

burdened with the conditions and the inconveniences which the legitimate operation of a railroad by the side of it might bring. The right of easement, whether acquired by condemnation or permissive use, he may enjoy, but that is a right common to all the public. He must bear the inconvenience which the placing of additional tracks across the street will bring in common with the public. Appellant owes him no higher duty than it owes to the public, namely, to keep that portion of its right of way occupied by the street free and open for use.

Appellee's lots are vacant and unoccupied and have been ever since the original track was laid in 1851. He has not been induced to spend money in the erection of buildings or to use the right of way in going to and from them, by the non-user of the part lying between appellee's property and the old track. There is, therefore, no element of estoppel that can arise. Nor can appellant be regarded as having abandoned that portion of its right of way. True, the right to lay the additional track was not availed of for many years, but the right, having been acquired by the deed from Kirsch and the charter from the legislature, could be exercised at any time when, in the judgment of appellant, the business of the railroad required it. A mere non-user could not constitute an abandonment.

Upon the contention of dedication we do not care to speak further than to say that if the permissive use of the sixty feet occupied by Fourth street be construed as evidence of a dedication it was a dedication to which conditions were annexed, namely, that the public should have an easement of the passage subject to the paramount right of the railroad company to construct additional tracks or do any other act embraced within the terms of its charter. When there is a dedication of a public street across a railroad right of way, the public takes subordinate to the rights of the railroad company. B. & W. Ry. Co. v. Waycross, 91 Ga. 573; Ayres v. Pa. Ry. Co., 48 N. J. Law, 44; Noblesville v. L. E. & W. Ry. Co., 130 Ind. 1.

Entertaining the view that appellee is entitled to no dam-

ages whatever, the judgment will be reversed and the cause not remanded.

Finding of Facts.—We find that appellant had complete right to lay the additional railroad track complained of, on its right of way, and that appellee has no lawful claim for damages to his property by reason of the laying of such additional track, or the operation of engines and trains over it.

National Mutual Church Ins. Co. v. Trustees of the M. E. Church, Bentley, Illinois.

1. INSURANCE—*Knowledge of Agent is Knowledge of the Company.*—The pastor in charge of a church, wrote to an insurance company without authority from the trustees of the church, requesting to be informed of the terms upon which insurance upon the church parsonage might be obtained. In response to this letter, the company wrote to the pastor that "in order that you may be fully prepared to lay the matter before your board. * * * I take pleasure in handing you policies herewith, subject, of course, to acceptance." The company entered a record of their insurance in a book kept by it for such purpose. The letter with two policies, one fire and the other tornado, inclosed, was received by the pastor at the post-office, and on his way from the post-office to his residence he met one of the trustees who was also a member of the parsonage committee, and there read the fire policy to him, whereupon the trustee informed him that he guessed he would take it, and then put it in his pocket. The trustee then went home, and while engaged in writing a letter to the company in which to send a remittance for the fire policy, the fire occurred and the parsonage was destroyed. After this the trustee sent the remittance and returned the tornado policy. *Held*, that the response of the manager of the insurance company inclosing the policy accomplished the end of creating the pastor the agent of the company to lay the matter before the board of trustees for their action, as is clearly implied, if not expressed, when he said, "in order that you (the pastor) may be fully prepared to lay the matter before your board * * * I take pleasure in handing you policies herewith, subject, of course, to acceptance." The pastor as agent of the company knew at the time he gave the policy to the trustee that it had been accepted, and his knowledge was the knowledge of the company for every sufficient purpose, and whether this knowledge was in fact communicated to the company's manager before the fire is not essential.

Assumpsit, upon a policy of fire insurance. Appeal from the Circuit Court of Hancock County; the Hon. JOHN A. GRAY, Judge presiding. Heard in this court at the May term, 1902. Affirmed. Opinion filed November 1, 1902.

H. H. C. MILLER and DAVID E. MACK, attorneys for appellant.

APOLLOS W. O'HARRA, attorney for appellees.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

This was a suit by appellees against appellant upon a policy of insurance issued by the latter, insuring against the loss by fire, the parsonage of the former. A jury having been waived, the trial by the court resulted in a finding and judgment against appellant for $500, to reverse which it prosecutes this appeal, and argues chiefly the point that there had been no contract of insurance effected at the time the loss occurred, for the reason the policy had not been accepted at any time before the fire, nor was the fact of such acceptance communicated to the appellant before that time. Numerous authorities have been cited and argued by the appellant to prove the validity of appellant's contention, and also by the opposite side to show the weakness of such position.

In the view we have of the case it will be unnecessary to review the many decisions to which we have been referred. The questions presented upon the record are questions of fact merely, in the determination of which the use of decisions as to the law applicable to the various phases of questions assumed in the argument, would tend to confusion.

Young, the preacher in charge of the appellee church, had effected insurance with appellant upon his household effects, and in correspondence with appellant's manager, without authority from the trustees of the church, expressed his belief that the authorities of the church contemplated insuring the parsonage, and requested to be informed of the terms upon which such insurance could be obtained. In response to this letter appellant wrote to

Young that "in order that you may be fully prepared to lay the matter before your board * * * I take pleasure in handing you policies herewith, subject, of course, to acceptance." On the same day this letter was written appellant entered a record of their issuance in a book kept by it for such purpose. The letter with the policies inclosed, of which there were two, fire and tornado, was received by Young at the post-office in Bentley about 10:30 A. M. October 6th, and on his way from the post-office to his residence he met George H. Friend, one of the trustees and also a member of the parsonage committee, and there read the fire policy to him, whereupon Friend informed Young that he guessed he would take it, and then put it in his pocket. Friend then went home, and while engaged in writing a letter to appellant in which to send a remittance for the fire policy, the fire occurred and the parsonage was destroyed. After this, Friend sent the remittance and returned the tornado policy. Notice of loss was sent to appellant but it declined to pay, and frequent correspondence ensued between the parties, not material to recite here, which at last culminated in this suit. The evidence shows further that Friend, May 9, 1900, had been authorized by the parsonage board as its agent to secure insurance on the parsonage.

Appellees had not constituted Young their agent to secure insurance upon the parsonage, but had expressly appointed Friend for such purpose. Young had not been authorized by Friend, and did not assume to be, to procure insurance from appellant. Young, in the first instance, as it appears, wrote of his own volition to the manager of appellant in a spirit of friendliness to both parties. The response of the manager inclosing the policy accomplished the end of creating Young the agent of appellant to lay the matter before the board of trustees for their action, as is clearly implied, if not expressed, when he said "in order that you (Young) may be fully prepared to lay the matter before your board, I take pleasure in handing you policies herewith, subject, of course, to acceptance." Young did lay the matter before

Friend, the authorized agent of the board, who accepted the policy and remitted for it. If Young was the agent of appellant, as we hold he was, he knew at the time he gave the policy to Friend, it had been accepted, and the knowledge of Young was the knowledge of appellant for every sufficient purpose, and whether this knowledge was in fact communicated to appellant's manager before the fire, was not essential. The policy was issued and delivered by appellant to an agent of its own selection and by him delivered to and accepted by the authorized agent of appellees before the fire occurred. No other rational conclusions flow from the undisputed evidence in the case.

The finding and judgment of the Circuit Court were right and the latter will be affirmed.

---

105 146
a208s 289

Village of London Mills et al. v. Fairview-London Telephone Circuit.

1. CITIES AND VILLAGES—*Granting Privileges of Streets to Telephone Company Need Not Be by Ordinance.*—Although the authority to grant telephone privileges in streets is usually exercised by ordinance, there is no decision in this state holding that such a license can be granted in no other mode.

2. SAME—*Company Given License to Operate Telephone System in Streets Has a Vested Right Therein.*—When a municipal corporation has, under statutory sanction, by ordinance or other lawful mode, authorized a telephone company to erect its poles in certain designated streets, and the company, on the faith of the license so granted, does erect them, it thereby acquires a vested right to use the designated streets so long as it conforms to the conditions of the license, and the license can not thereafter be revoked at the pleasure of the municipality. Such license having been granted and accepted, and money having been expended upon the faith of it, it is not revocable except for cause.

Bill for an Injunction.—Appeal from the Circuit Court of Fulton County; the Hon. George W. Thompson, Judge presiding. Heard in this court at the May term, 1902. Affirmed. Opinion filed November 24, 1902.

This is a suit in chancery brought by appellee to restrain appellants from interfering with appellee's telephone business and property.

The amended bill recites that on April 2, 1900, complainant presented to the president and board of trustees of the village of London Mills a petition, asking for the privilege of erecting and maintaining on the streets and alleys of said village, poles and wires for a telephone system; that on the same date, at a meeting of said board, said petition was granted; that they at once erected poles and wires, established in the village a central telephone office and connected with four other companies for telephone service for the general public, thereby expending a large sum of money and obligating themselves by contract to maintain a telephone exchange; that on the 13th day of March, 1901, the London Power and Electric Company was incorporated to conduct in said village an electric plant for light power, water works and telephone service; that on the 25th of March, 1901, the village board passed an ordinance granting to said corporation the exclusive privilege of maintaining a telephone system in the village for twenty-five years, excepting that telephone lines and centrals already established should remain immune from the effects of such exclusive grant for the period of six months; that certain members of the board of trustees of said village were interested as stockholders in said corporation at the time such exclusive privilege was granted and that the granting of such exclusive privilege franchise was in pursuance of a fraudulent scheme to crush out complainant's business and obtain a monopoly of the telephone business in said village; that in furtherance of such fraudulent scheme, the village board passed an ordinance on August 22, 1901, whereby it was attempted to revoke all other permits except the one granted to said corporation, and threatened with prosecution all persons attempting to exercise rights under other permits; that on November 7, 1901, the village board served upon complainant the following notice:

"STATE OF ILLINOIS,
Fulton County, } ss.
Village of London Mills.

To Fairview-London Telephone Circuit and all persons, individuals and companies, owning, claiming, operating or controlling by, through or under said company, telephone poles, wires and fixtures in said village of London Mills:

By order, direction and authority of the president and board of trustees of said village of London Mills, you are hereby notified and required to remove from all of the streets and alleys, situate within the limits of the said village of London Mills, all telephone poles, telephone wires and all other telephone fixtures and appliances used, owned, controlled and operated by you, and now maintained in, on, upon, across or over any of the streets and alleys, aforesaid, of the said village of London Mills, within a period of thirty (30) days from the date of the receipt of this notice by you.

You are further notified that upon your failure to comply with the demand contained in this notice, that the said village of London Mills will take the necessary steps to remove the poles, wires, fixtures and appliances aforesaid, according to law.

Dated this 7th day of November, A. D. 1901.

FRANK J. DAINES,
Village President.
B. A. HILL, Village Clerk."

And that said village board are threatening to forcibly remove complainant's poles, wires and other fixtures in accordance with said notice. The bill prays that the village board and the London Power and Electric Company be enjoined from removing complainant's poles, wires or other fixtures and from in any way interfering with their telephone business. Appellants filed a demurrer to the amended bill, which was by the court overruled, and as appellants elected to stand by their demurrer, the court rendered a decree *pro confesso* against them, perpetually enjoining appellants from interfering with or removing the poles, wires or fixtures of appellee's telephone system, as contemplated by the notice above quoted. From that decree this appeal is prosecuted.

CHIPERFIELD & CHIPERFIELD and THOMAS & ROBISON, attorneys for appellants.

A. M. BARNETT, LUCIEN GRAY and M. P. RICE, attorneys for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

The sufficiency of appellee's amended bill to support the decree rendered is the only serious question for our consideration. It is assigned for error that the court permitted amendments to the original bill and denied a motion of appellants to strike the amended bill from the files. But as the amendments were appropriate ones and clearly allowable under the chancery practice in Illinois, a discussion of that alleged error is unnecessary.

It is contended that the order of the president and board of trustees of the village of London Mills of April 2, 1900, granting appellee the privilege of using the streets and alleys of the village for the erection and maintenance of necessary poles and wires for a telephone circuit was void. The contention is based upon the proposition that the granting of such privilege can only be accomplished by ordinance. The statute confers upon village boards and city councils the authority to regulate the use of streets and alleys. Authority is conferred upon them to license the use of streets and alleys for telephone purposes, but the statute is silent as to the manner in which such authority may be exercised. It is a matter of common knowledge that it is usually exercised by ordinance, but we are advised of no decision of our Supreme Court or of any of the appellate courts in this state holding that such a license can be granted in no other mode. In view of the growing use of the telephone and the establishments of plants for telephone service in all the cities and villages of the state, we think it would be wise in the legislature to require the granting of telephone privileges to be by ordinance, but in the absence of such legislative requirement, we do not feel justified in holding that the granting of such privilege otherwise than by ordinance is void.

That the village board had no power to grant the London Power and Electric Company an exclusive privilege to operate a telephone plant is a question not open to serious controversy. The ordinance of March 25, 1901, in so far as it attempted to do so, therefore, was void. The same may be said with reference to the ordinance of August 22, 1901. The passage of those ordinances, the demand of appellee to remove their poles and wires from the streets and alleys, and other steps taken by the village board, as charged in the bill, manifested a deliberate and fraudulent intention to crush out the business of appellee and give to the London Power and Electric Company a monopoly of the telephone business at London Mills.

When a municipal corporation has, under statutory sanction, by ordinance or other lawful mode, authorized a telephone company to erect its poles in certain designated streets, and the company, on the faith of the license so granted, does erect them, it thereby acquires a vested right to use the designated streets so long as it conforms to the conditions of the license, and the license can not thereafter be revoked at the pleasure of the municipality. Such license having been granted and accepted, and money having been expended upon the faith of it, it is not revocable except for cause. When the licensee accepts, expends money and enters into possession of the streets to the extent required by the use of the poles and wires, the license becomes a binding contract between the municipality and the telephone company, and to revoke it would not only be inequitable but beyond the power of the municipality. The People ex rel. v. The Central Union Telephone Company, 192 Ill. 307; City of Belleville v. Citizens Horse Railway Co., 152 Ill. 171; City of Quincy v. Bull et al., 106 Ill. 337; Chicago Municipal Gas Light and Fuel Company v. Town of Lake, 130 Ill. 42; HudsonTelephone Co. v. Jersey City, 49 N. J. Law, 303.

There is nothing in the bill to indicate that the village board desired to revoke appellee's license because its members entertained any doubt as to the authority to grant the

license or because of any improper exercise of it. There is no pretense that the members of the board regarded the exercise of the license as in any wise infringing on the rights of the public in the use of the streets and alleys. The attitude assumed by them concedes their authority to grant appellee a license, but they seek to revoke it because of the irregular mode in which it was granted. In doing so, they are not actuated by a desire to conserve the public weal, but by a purpose to further the interests of a proposed monopoly. It was proper, therefore, to restrain the threatened removal of appellee's poles and wires, and the decree will be affirmed.

Irwin W. Baker v. William Murphy.

1. REAL ESTATE BROKERS—*Interference of Owner with Broker in Negotiating Sale.*—Where the owner of land engages the services of a broker to sell his land, so as to net seventy dollars per acre, and agrees to protect the broker in pricing the land at from seventy-one to seventy-two dollars and fifty cents, and afterward connives with a prospective purchaser with a view of depriving the broker of his commissions, he is liable to the broker for his services, the latter being instrumental in bringing about the sale of the land.

Assumpsit, for broker's commission. Appeal from the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge presiding. Heard in this court at the May term, 1902. Affirmed. Opinion filed November 24, 1902.

C. E. RUSSELL and J. H. DYER, attorneys for appellant.

C. M. BRIGGS, attorney for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

In the month of April, 1901, appellee and appellant, both residents of Hoopeston, Illinois, entered into a contract whereby appellee was to sell appellant's farm of 159 acres, situated near Clarence, in Ford county, Illinois, at $70 per acre net to appellant, it being agreed that appellee should receive as compensation all that he could sell the land for above that price. Appellee showed the farm to different

prospective purchasers and made frequent efforts to sell it, but without avail. On September 24, 1901, appellant told appellee that he had received a letter from Samuel Kelley, a resident of Clarence, inquiring about the land with a view to purchasing. It was then agreed that appellee, who had arranged to show another man the farm on the following day, should see Kelley and sell it to him, if possible. Appellant promised to protect appellee in his commission upon appellee's pricing the land to Kelley at $71 per acre and stated that he did not care if appellee priced it at $72.50, just so he got $70 net. Appellee, after failing to sell the farm to the man he showed it to on the next day, called upon Kelley at Clarence and priced it to him at $72.50 per acre. That was in the forenoon. Kelley expressed the opinion that the price was too high, but requested appellee to call at his office in the afternoon, which appellee did at about three o'clock. In the second interview, Kelley stated that he was willing to pay $70 per acre and wanted to know if it could not be bought for that. Appellee told him it could not. Between four and five o'clock, he returned by train to Hoopeston. Within a few minutes after reaching there, he saw appellant and Kelley in conversation. Kelley had managed to reach Hoopeston, unobserved by appellee, by boarding the train at Clarence from the side opposite the depot and by riding in a different car from that ridden in by appellee. Appellee, surprised to see Kelley, at once accosted the parties and told appellant that he had been to see Kelley about selling the farm and that if appellant sold it to Kelley, he should expect appellant to pay him for his services. Appellant replied that if there was to be any trouble about the matter, he would take the sale of the property out of appellee's hands. Appellant did sell the farm to Kelley for $70 per acre. Soon after, appellee brought suit against appellant and recovered a judgment of $159 and costs.

It is not disputed that when appellant employed appellee to interview Kelley and, if possible, make a sale of the farm to him, that appellant agreed to protect appellee in

pricing the land to Kelley at from $71 to $72.50 per acre. While appellee was in good faith endeavoring to carry out their mutual understanding, the evidence shows that appellant was scheming with Kelley to deprive appellee of compensation. Immediately after appellee priced the land to Kelley at Clarence and assured him that it could not be purchased at $70 per acre, Kelley called up appellant by telephone and agreed to take the land at $70 per acre. He arranged to have a meeting with appellant that day without the knowledge of appellee, managed to elude appellee in going from Clarence to Hoopeston and agreed upon the terms of sale upon the basis of $70 per acre. The moving influence of each in their reprehensible conduct is apparent. Kelley wanted the land for a price exclusive of appellee's commission. Appellant was anxious for a quick sale. Appellant bargained with Kelley, regardless of his promise to protect appellee in his commission. There can be no misunderstanding as to the proper interpretation and spirit of the expression, "protect him in his commissions." It precluded any interference by appellant until appellee had exhausted reasonable effort to sell to Kelley or until after appellant had in good faith taken the sale of the farm out of appellee's hands. Appellee had not exhausted all reasonable effort to sell to Kelley and appellant did not in good faith take the sale of the land out of appellee's hands. He did announce that he took the sale out of appellee's hands, but that was not until after he had agreed to sell to Kelley at $70 per acre.

Appellee was instrumental in bringing about the sale of the land to Kelley. In doing so, he acted in obedience to the instructions from appellant. Appellant violated his agreement, and to allow him to escape liability now, would be placing a premium upon dishonesty. In this view of the case, it is unnecessary to enter upon a discussion of the instructions. The jury were instructed correctly as we see the case. Justice has been attained and the judgment will be affirmed.

William Henderson v. W. W. Tobey.

1. PAROL EVIDENCE—*Competent to Show the Consideration Different from That Expressed in the Deed.*—Parol evidence is admissible to show that the grantee agreed to pay taxes in addition to the consideration expressed in the deed.

Covenant.—To recover cost of redemption from tax sale. Appeal from the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge presiding. Heard in this court at the May term, 1902. Reversed and remanded with directions. Opinion filed November 1, 1902.

D. D. EVANS and G. M. MCDOWELL, attorneys for the appellant.

O. M. JONES, attorney for appellee.

MR. JUSTICE BURROUGHS delivered the opinion of the court.

On November 14, 1900, the appellant conveyed to the appellee, by statutory form of warranty deed, certain lands in Vermilion county, Illinois, for the express consideration of $28,800. At the time the deed was made, the taxes on the lands for the year 1900 had not been paid, nor had they been, at the time the deed was made, extended by the county clerk against the lands, but under our statute such taxes were at that time, a lien upon the lands.

In June, 1901, the lands thus conveyed were sold for the taxes of 1900, as such taxes had not been paid, and the appellee afterward, but before this suit was commenced, redeemed the lands from such sale, it costing him $124.30 to do so. And by this action in covenant instituted in the Circuit Court of Vermilion County by the appellee against the appellant, the former thereby sought to recover the cost of such redemption from the latter under the covenants of warranty in the deed.

The appellant pleaded especially, by three pleas, that as a part of the consideration of the deed, the appellee, knowing the taxes on the lands for 1900 were unpaid, agreed by parol with the appellant, that he (appellee) would pay the

taxes in question; and each plea confessed nominal damages of $1.

To these pleas the Circuit Court sustained a general demurrer. The appellant abided by his pleas, and the court gave judgment in favor of the appellee for the full amount of $124.30, to reverse which the appellant prosecutes this appeal, and urges that the pleas presented a good defense to the action for all but $1 damages, which they confessed; and that the court erred in sustaining the demurrer thereto and in awarding damages for more than $1.

And in that view we concur for the reasons given by us in the opinion in Lloyd v. Sandusky, 95 Ill. App. 593.

The judgment of the Circuit Court will therefore be reversed and the case remanded to that court with directions to overrule the demurrer to the pleas, and then proceed in the case as to law and justice appertain.

John A. McAyeal et al. v. Naomi Gullett.

105 155
a202s 214

1. BILLS AND NOTES—*Indorser Coming Again into Possession of Note.*—Where a person who owns a bill of exchange or promissory note, indorses it to another, whether for value or for the purpose of collection, and comes again in possession thereof, he must be regarded, unless the contrary appears in evidence, as the *bona fide* owner and holder thereof, and entitled to recover thereon.

2. WITNESSES—*Competency of Defendants to Testify Concerning Transactions Between Themselves and a Deceased Payee of a Note.*—The defendants to a suit on a note, the payee of which is dead, are disqualified from testifying as to transactions between themselves and the deceased payee of the note, out of which resulted the note being given to them, under the statute which was enacted to protect those who succeed to the payee's rights under the note, whether as executrix, heir, surviving partner or purchaser.

Assumpsit, on a promissory note. Appeal from the Circuit Court of Ford County; the Hon. JOHN H. MOFFETT, Judge presiding. Heard in this court at the May term, 1902. Affirmed. Opinion filed November 1, 1902.

L. A. CRANSTON and A. L. PHILLIPS, attorneys for appellants.

RAY & DOBBINS, attorneys for appellee; CLOUD & MOFFETT, of counsel.

MR. JUSTICE BURROUGHS delivered the opinion of the court.

This was an action of assumpsit brought in the Circuit Court of Ford County, on May 8, 1901, by the appellee, Naomi Gullett, against the appellants, John A. McAyeal, and Charles D. McAyeal, upon a certain promissory note as follows:

"$1,000. ELLIOTT, ILL., Dec. 14, 1888.

Fourteen months after date we promise to pay to the order of A. T. Gullett, one thousand dollars at Elliott, for value received, without any relief whatever from valuation or appraisement laws, with eight per cent interest from date until paid, and attorney's fees. It is agreed to renew part of this note if parties can not meet it at maturity.

[Signed] JOHN A. MCAYEAL,
CHAS. D. MCAYEAL."

Upon the back of which was written the following:

"Pay to Naomi Gullett, as legatee under the will of A. T. Gullett, deceased.

[Signed] NAOMI GULLETT,
Executrix of the estate of A. T. Gullett, deceased."

The declaration averred that the note was given by the defendants to the said A. T. Gullett on the day of its date; that he died testate on February 8, 1890, and that by his last will and testament he bequeathed said note to the plaintiff. The defendants pleaded as a defense to the action that the sole and only consideration of the note was for money won by payee thereof from the defendants in speculating on the market price of grain, to wit, by buying and selling deals and options in grain; that in each and all of said deals and options, it was understood and intended by both the said A. T. Gullett and defendants, that neither was to receive or deliver the grain so bought or sold, and that the loss or gain resulting from such transaction, should be and was settled by payment or receipt of difference between the price agreed upon and the market value of same at the time appointed for the delivery thereof; and that such money so lost was settled by the execution of the

said note to the said A. T. Gullett by the defendants; of all which the said A. T. Gullett had full knowledge.

The plea was traversed, issue joined and the case tried by jury and resulted in a verdict and judgment in favor of the plaintiff for $2,030.15.

The defendants moved for a new trial and that being denied, they prosecute this appeal, and to effect a reversal argue that the court erred in instructing the jury, in ruling on the evidence and in refusing a new trial, as the verdict and judgment are not supported by the evidence.

The evidence shows that the payee of the note in his lifetime was engaged in buying and selling grain, feed, seed and coal, in the town of Elliott, Illinois; that the defendants were farmers, living near him, and during the year 1887 and 1888, they bought from him grain, seed and coal and sold him grain upon a mutual running account; that much of the grain so bought and sold was purchased and sold on the Board of Trade in Chicago through commission agents there, who were members of that board; but the evidence does not satisfactorily show that such purchases and sale of grain were made with the intention on the part of buyer and seller that the grain should not be delivered but only the difference between the buying and selling price and the market price thereof should be settled for between the parties. It does appear, however, that the consideration of the note was for a part of the balance due from the defendants to the payee of the note upon the said account.

There is no dispute but that the payee of the note died testate, and that he bequeathed the note to his wife, the plaintiff, who was the duly appointed executrix of his will.

On the back of the note was also written the following: "Pay to J. E. Ragsdale. Signed Mrs. A. T. Gullett, executrix estate of A. T. Gullett, deceased." "Pay to Mrs. A. T. Gullett. Signed J. E. Ragsdale." Which the court, over the objection and exception of the defendants, permitted the plaintiff to erase on the trial, upon her stating that while the note had been indorsed by her to J. E. Ragsdale and

by him back to her, that she had received the note as legatee under the will of her husband, the payee of the note, as a part of the assets of his estate bequeathed to her; and that, at the time of the commencement of this suit, she possessed and owned the note.

The defendants offered to testify themselves to the facts averred in their plea, but their testimony was rejected by the court upon the special objection of the plaintiff that, under the statute, they were not competent witnesses to prove those facts, as they were parties to the suit, and she was suing them on a note which they had given to her deceased husband and which she had received from his estate as legatee under his will.

The defendants excepted to the ruling of the court in granting the leave to erase and in rejecting the offered testimony and urge that such rulings were reversible error.

We think that the defendants were not prejudiced by the court permitting the indorsement to be erased, for the reason that where a person who owns a bill of exchange or promissory note, indorses it to another, whether for value or for the purpose of collection, and comes again in possession thereof, he must be regarded, unless the contrary appears in evidence, as the *bona fide* holder and owner thereof, and entitled to recover thereon. Dugan, Ex'r, v. United States, 3 Wheaton, 173, Law Ed. U. S. Reports, B. 4, 362.

And the court also properly refused to permit the defendants to testify in the case to transactions between themselves and the deceased payee of the note, out of which resulted the note being given by them to him for the reason that they were disqualified under the statute which was enacted to protect those who succeed to his rights under the note, whether as executrix, heir, surviving partner or purchasers. Foster v. Hart, 29 Ill. App. 260, and Whitmer v. Rucker, 71 Ill. 410.

The testimony introduced by the defendants showed that in the mutual account between the parties to the note, much of the amount charged to the defendants by the

deceased payee of the note, was for losses on grain bought and sold on the Board of Trade in Chicago, and that the buying and selling of grain there was governed by certain written rules which they did not introduce, but which the appellee, over their objection and exception did, and it is insisted that the court committed reversible error in admitting them in evidence; but we think not, for the reason that while, under the issues tried, it was immaterial what the custom or rules of trading on the Board of Trade were (Pardridge v. Cutler, 168 Ill. 504), yet inasmuch as the defendants showed that a part of the account for which the note was given was for losses made by them on purchases and sales of grain made on the Board of Trade in Chicago, it was not prejudicial error for the court to afterward permit the plaintiff to show the rules governing such purchases and sales of grain there.

We have carefully read the various instructions given, modified and refused, of which the appellants complain, and we fail to find wherein the rulings of the trial court on any one of them was prejudicial to appellants, and a careful consideration of the evidence convinces us that it supports the verdict, and our conclusion is that the judgment should and will be affirmed.

105 159
106 455
204s 65

The Northwestern Mutual Ins. Co. v. Ora C. Churchill.

1. INSURANCE—*Death by Suicide, Sane or Insane.*—A provision in a contract of insurance that in case the insured shall commit suicide, whether sane or insane, the policy shall be null and void, is not against public policy, but is valid, and is a sufficient defense to an action on the policy, where the insured has committed suicide, sane or insane.

Assumpsit, on a policy of life insurance. Appeal from the City Court of Canton; the Hon. P. W. GALLAGHER, Judge presiding. Heard in this court at the May term, 1902. Reversed and remanded. Opinion filed November 1, 1902.

BROWN, WHEELER, BROWN & HAY, attorneys for appellant.

FRED H. SNYDER and GRANT & GRANT, attorneys for appellee.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

This suit was brought on a policy of insurance, made by the appellant on the life of Franklin S. Churchill, for the sum of $1,000. The policy was issued, as appears from the declaration as expressed therein, "in consideration of the statements and agreements made in the application for this policy, which is hereby made a part of this contract, and in further consideration of the payment," etc. The application, as appears also from the declaration, contains the following:

"It is also agreed that if within two years from the date hereof I shall pass south of the Tropic of Cancer, without a written permit therefor signed by the president or secretary of the company, or shall, within the said two years, either undertake an aerial voyage or die in consequence of a duel, or, whether sane or insane, die by my own hand, then, and in every such case, any policy issued on this application shall be null and void."

To the declaration the defendant filed four special pleas, numbered respectively 2, 3, 4 and 5. These, in substance, aver that the policy in each case was issued in consideration of the statements and agreements made in application for the policy, which application was made a part of the contract; that said application was made and dated August 22, 1900, and by the application the assured did declare and agree, that if he should, within two years from the date of said application, whether sane or insane, die by his own hand, then and in that case any policy issued on said application should be null and void; that the said assured did, within two years next after the date of said application, to wit, on the 8th of September, 1901, die by his own hand. By one of the pleas it is averred that the death was not the result of accident and by another that he died by his own hand, sane or insane. To these pleas the plaintiff filed two replications. By the first it is averred that at the time in

the second, third, fourth and fifth pleas mentioned, the said Franklin S. Churchill was so affected with insanity as to be unconscious of the said act alleged in the second, third, fourth and fifth pleas, to wit, the alleged taking of his own life, or the physical effect of such act; by the second replication it is averred that at said time in said second, third, fourth and fifth pleas alleged, to wit, on September 8, 1901, the said Franklin S. Churchill was driven to the commission of said act of self-destruction as in and by said second, third, fourth and fifth pleas alleged, by an insane impulse which he, the said Franklin S. Churchill, had not the power to resist. To these replications, and each of them, the defendant interposed a demurrer, which was by the court overruled, and the defendant stood by its demurrer. The principal errors assigned, draw in question this action of the court.

We held in Supreme Court of Honor v. Schwartz, 96 Ill. App. 587, as a question of fact, that the assured had died by his own hand, and reversed the judgment for that reason. In the argument in that case, however, it was assumed, without discussion, that under the conditions of the contract, if the assured committed suicide, whether sane or insane, there could be no recovery; and the point raised in the present case was not made, and was not, therefore, decided, nor discussed by the court. In the opinion of the Supreme Court by which the judgment was affirmed, 194 Ill. 344, it was said: "It is not claimed the plaintiff could recover if Weinberger died by his own hand, nor that the fact found (suicide) would not absolutely preclude a recovery as a matter of law." So far as we know our Supreme Court has not decided this question; at any rate no authority of that kind has been cited to us, and we are unable to find any. In Grand Lodge I. O. M. A. v. Weiting, 168 Ill. 408, there was a clause in the contract of insurance to the effect that, if the assured should commit suicide, then only the amount paid by him into the beneficiary fund should be paid at his death; and the court held in that case that if at the time of the suicidal act the

assured was so affected with insanity as to be unconscious of the act, or of the physical effect thereof, or was driven to its commission by an insane impulse which he had not the power to resist, the act of self-destruction is regarded as though it were the result of accident, or some irresistible external force, and the proviso of a policy including suicide or self-destruction will not attach, but the insurer will be held liable. The case at bar, however, presents a different question than the one in the case just cited, although it is contended by counsel for appellee, that if the degree of insanity was such as is equal to that described by the court in the case we have alluded to, its principle will apply to every case of suicide, even where the clause is further limited by the phrase, "whether sane or insane," and the contract in the case presented is so limited.

In the case of Supreme Tent, etc., v. Hammers, 81 Ill. App. 560, in the Appellate Court of the Second District, it was held that a contract like the one here in question was not against public policy, and that it was valid, and that it was a sufficient defense if the assured had committed suicide, sane or insane, and to the same effect is the decision of the like court in the Fourth District, in Supreme Lodge, etc., v. Clarke, 88 Ill. App. 600. The latter case was, however, reversed in 189 Ill. 639, not upon its merits, but because the court had not entered a proper judgment. In the case of Bigelow v. Berkshire Life Ins. Co., 93 U. S. 284, the contract of insurance contained a condition of avoidance if the insured should die by suicide, sane or insane; the company agreed to pay the surrender value only, of the policy, at the time of his death; the defendant pleaded that the insured died by suicide, to which the plaintiff replied that Bigelow, at the time he inflicted the pistol wound upon his person by his own hand, was of unsound mind, and wholly unconscious of the act. The defendant demurred to this replication, which was sustained by the trial court, and the plaintiff took the case to the Supreme Court for review. It was there said, citing Life Ins. Co. v. Terry, 15 Wall. 580, that the question in that court

was settled, that the words "avoiding a policy," "shall die by his own hand," "shall commit suicide," referred to an act of criminal self-destruction, and did not apply to an insane person who took his own life. But in the case there presented, the insurers had gone further, and sought to avoid altogether this class of risks; and if they had succeeded in this, it was the duty of the court to give effect to the contract, as neither the policy of the law nor sound morals forbid them to make it. Felonious suicide was not alone in the contemplation of the parties, for if it had been, there was no necessity of adding anything to the general words. These had been construed by many courts of high authority to exclude self-destruction by an insane man. As the time between sanity and insanity is often shadowy, and difficult to define, that company thought proper to take the subject from the domain of controversy, and by stipulation, exclude all liability by reason of the death of the party by his own act, whether at the time he was a responsible moral agent or not. Nothing can be clearer than that the words, "sane or insane," were introduced for the purpose of excepting from the operation of the policy any intended self-destruction, whether the insured was of sound mind or in a state of insanity. No one could be misled by them; nor could an expansion of the language more clearly express the intention of the parties.

The reasoning of the cases to which we have referred commends itself. We can imagine no more reason for depriving an insurance company of the right to limit its liability by contract against self-destruction resulting from insanity, than from other causes, the risks of which may be expressly excepted from the contract. There is, as has been seen, nothing in the nature of the contract affecting public policy or morality. It contravenes no rule of common or statute law; and we are at a loss to state a valid reason why the liberties of both the insurer and insured, to make such contract as seems best to them, should be invaded by the courts, by placing a construction upon the words of the contract that clearly was not intended by the

parties at the time it was made, or by reading words into the contract that are plainly not there, nor intended by the parties to be put in it, but on the contrary, a clear intention to exclude them. It is axiomatic that a court will not make a better contract for a person than he has made for himself. It follows, therefore, that in our opinion, the trial court erred in overruling the demurrer to the replications to the pleas of the defendant. The judgment of the City Court will be reversed and the cause remanded, with directions to sustain the demurrer to the replications.

The Northwestern Mutual Life Ins. Co. v. George S. Churchill, a Minor, by Ora C. Churchill, His Guardian.

BROWN, WHEELER, BROWN & HAY, attorneys for appellant.

FRED H. SNYDER and GRANT & GRANT, attorneys for appellee.

OPINION PER CURIAM.

This suit is like Northwestern Life Insurance Company v. Ora C. Churchill, in which we have filed an opinion stating our reasons for reversing the judgment; to which we refer as containing our reasons for the same judgment entered in this case.

The judgment of the City Court is reversed and the cause remanded to that court with directions to sustain the demurrer to the replication to the pleas of the defendant.

Edward W. Marvel v. James McKinzey.

1. STATUTE—*Purpose of Chapter 95, Par. 27, R. S.*—The purpose of Chapter 95, Par. 27, R. S., is to secure to the mortgagor whose property has been sold under a chattel mortgage, full information of the amount each article brought and the items of expense attending such sale, and where the mortgagor has received all the information concerning the

sale in question that he was entitled to under the requirements of the statute, he can not complain.

Debt, to recover a statutory penalty. Appeal from the Circuit Court of DeWitt County; the Hon. WILLIAM G. COCHRAN, Judge presiding. Heard in this court at the May term, 1902. Reversed. Opinion filed November 24, 1902.

LEMON & LEMON, attorneys for appellant.

EDWARD J. SWEENEY, attorney for appellee.

MR. JUSTICE BURROUGHS delivered the opinion of the court.

The appellee, James McKinzey, sued the appellant, Edward W. Marvel, in the Circuit Court of DeWitt County, in an action of debt to recover one-third the value of certain personal property which it was alleged that the appellant had sold under the power of sale contained in a chattel mortgage which the appellee had given to the appellant to secure appellee's note to appellant for $1,000.

The declaration charged that the appellant did not make out a statement showing the items of said personal property sold, the names of each purchaser thereof and the amount for which each article sold, and did not make out an itemized statement of the necessary reasonable expenses incurred in taking, keeping and selling said property; and that the appellant did not, within ten (10) days after said sale, deliver such itemized statement to the appellee in person or by mail, by means whereof, and by virtue of the provisions of Chapter 95 of the Revised Statutes of the State of Illinois relating to chattel mortgages, the appellant became liable to pay the appellee on account of such failure, said one-third of the value of said property, which value is alleged to be $1,800.

The appellant pleaded *nil debit*, upon which issue was joined, and a trial had before the court without a jury by consent of parties, which resulted in a finding and judgment in favor of the appellee for $474. The appellant excepted to the finding and judgment and moved for a new trial, which was denied, and he excepted; he then moved in arrest of judgment, which was overruled, and he excepted.

To effect a reversal of the judgment, appellant brings the case to this court by appeal, and urges that the finding and judgment are not supported by the evidence and the law applicable thereto; that the averments in the declaration are not sufficient to support the judgment; and that the court ruled improperly on the propositions of law which were submitted.

It appears that the appellant held a chattel mortgage upon a lot of personal property which had been given to him by the appellee to secure the payment of a $1,000 note of the appellee to the appellant, and that he also held by assignment two other chattel mortgages, and the notes they secured, which the appellee had also given upon the same property to others, and which were prior liens upon the property to the one he gave to the appellant. The appellant sold the property under the power of sale contained in the mortgage securing the $1,000 note, and the appellee attended the sale, assisted in conducting it, bought some of the property sold, saw the list of items sold, made by the clerk of the sale, had an opportunity to examine for himself the clerk's list showing what each article sold brought, to whom sold, and that the sale amounted to $1,529.40.

Five days after the day the property was sold, appellant's agent, who conducted the sale for the appellant, gave the appellee a written statement showing the amount the property sold for, and of each item of the expenses attending the sale and care of property, etc., and how the balance of the proceeds was applied upon the indebtedness secured by the mortgages, which were liens upon the property; which statement the appellee received without any objection whatever that it failed to contain any information which he desired or was entitled to.

The appellee seeks in this action to recover from the appellant under the following provision of chapter 95, paragraph 27, Starr & Curtis' Ill. Statutes (1896), p. 2774, Sec. 2:

"That all sales of personal property under the power of sale contained in any chattel mortgage, shall be made in the county where the mortgagor resides, or where the prop-

erty is situated when mortgaged; if there are more than one mortgagor, then in the county where the mortgagor in possession of the property resides at the time of taking possession by the mortgagee; and in every case where the mortgagor can be found, or his or her postoffice address can be ascertained, notice of the time and place of said sale shall be given to one or more of the mortgagors three days prior to said sale, and by posting a copy of said notice at the place where said goods secured by said mortgage are located, at least three days prior to said sale; and upon the making of said sale the mortgagee shall make out a statement showing the items of personal property sold, the names of each purchaser and the amount for which each article sold, and also an itemized statement of the necessary reasonable expenses incurred in taking, keeping and selling said property, and shall deliver the same to the mortgagor, or some one of them, in person or by mail, and if he fails so to do within ten days after said sale, the owner of said property may sue for and recover one-third of the value of the property so sold from the mortgagee or person making said sale as assignee or said mortgagee: *Provided*, that nothing in this act shall apply to the sale of furniture by regular dealers on the so-called installment plan."

The purpose of the statute is to secure to the mortgagor whose property has been sold under a chattel mortgage, full information of the amount each article brought and the items of expense attending such sale. Robley v. Culwell, 69 Ill. App. 272.

It is undisputed by the evidence that the appellee received all the information concerning the sale in question that he was entitled to under the requirements of the statute; therefore the learned judge who tried this case erred in finding otherwise, and his finding is not supported by the evidence and the law applicable thereto.

That being the case, it is unnecessary for us to consider the other errors assigned. For the error indicated, the judgment will be reversed.

Finding of facts, to be incorporated in the record:

This court finds as a part of the judgment that the appellant did not fail to furnish to the appellee the information concerning the sale of the personal property in question as charged in the declaration.

CASES

DETERMINED IN THE

FIRST DISTRICT

OF THE

APPELLATE COURT OF ILLINOIS

DURING THE YEAR 1902.

City of Chicago v. Clara Merwin, a Minor, by Her Next Friend.

1. APPELLATE COURT PRACTICE—*Duty to Set Aside Verdicts Which Are the Result of Passion and Prejudice.*—It is the duty of the Appellate Court to set aside verdicts which clearly appear to be the result of passion or prejudice.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge presiding. Heard in the Branch Appellate Court at the October term 1901. Opinion filed December 30, 1902. Remittitur filed and cause affirmed, January 5, 1903.

JOHN E. OWENS and SIGMUND ZEISLER, attorneys for appellant.

DEVINE & O'CONNELL, attorneys for appellee; C. L. MAHONY, of counsel.

MR. PRESIDING JUSTICE WATERMAN delivered the opinion of the court.

This was an action to recover loss sustained by reason of personal injury brought about, as was contended, by the negligence of the city.

It appeared upon the trial that the plaintiff, then a girl

five years of age, stepped through a defective sidewalk and sustained a fracture of the thigh bone. She was immediately taken to a hospital, where she was attended to, her limb being put in a plaster cast. Shortly thereafter she was taken to her home, laid in bed, and had a weight fixed to her limb. She was in bed nine weeks. As a result of the injury, and largely, it would seem, of unskillful or negligent treatment following upon the same, her left leg is shorter than the right and she will always be lame.

She obtained upon the trial a verdict and judgment for $15,000, from which this appeal is prosecuted. It is urged by appellant that the magnitude of the verdict indicates such passion and prejudice on the part of the jury that the judgment should be set aside and the cause remanded for a new trial, and that the court should not affirm upon a remittitur. Counsel for appellee indicate that they are willing the court should order an affirmance upon a remittitur, such as the court deems proper to be made. The duty once exercised by the Supreme Court, of setting aside verdicts which clearly appear to be the result of passion or prejudice, has been cast upon the Appellate Court. This duty we are required to exercise in accordance with rules and practice established by a long line of authorities, among which are: Chicago, B. &. Q. R. R. Co. v. Avery, 10 Ill. App. 210; Chicago & N. W. R. R. Co. v. Cummings, 20 Ill. App. 333; North Chicago Street Ry. Co. v. Wiswell, 68 Ill. App. 443; Chicago, Anderson Press Brick Co. v. Sobkowiak, 34 Ill. App. 312; Village of Evanston v. Fitzgerald, 37 Ill. App. 86; Stearns v. Reidy, 33 Ill. App. 246; City of Joliet v. MacCraney, 49 Ill. App. 381; Grossman v. Cosgrove, 75 Ill. App. 385; Gibson v. Glizozinski, 76 Ill. App. 400; North Chicago Street Ry. Co. v. Brown, 76 Ill. App. 654; North Chicago St. Ry. Co. v. Hoffart, 82 Ill. App. 539; Chicago, B. & Q. R. R. Co. v. Hazzard, 26 Ill. 373; Chicago and Rock Island Ry. Co. v. McKean, 40 Ill. 218; Peoria Bridge Association v. Loomis, 20 Ill. 236; Ill. Cent. Ry. Co. v. Welch, 52 Ill. 183; Toledo, Wabash & Western Ry. Co. v. Fredericks, 71 Ill. 294; Ill. Cent. Ry. Co. v. Ebert, 74 Ill. 399; Northern Packet v.

Binninger, 70 Ill. 571; C. R. I. & Pac. Ry. Co. v. McKittrick, 78 Ill. 619; Chicago West Division Ry. Co. v. Hughes, 87 Ill. 94; Chicago & Alton Ry. Co. v. Murray, 71 Ill. 601; City of Chicago v. Herz, 87 Ill. 541; Loewenthal v. Strong, 90 Ill. 74.

The verdict in this case was for very much more than the evidence warranted. We believe it was the result of a feeling that it was necessary to punish the city for its negligence in permitting the sidewalk at which the plaintiff was injured to be in the condition it was, and that the jury did not arrive at its conclusion from a calm consideration of the amount that should be awarded as compensation for the injury received. If the plaintiff shall within ten days remit from the judgment the sum of $7,500, the judgment will, less the remittitur, be affirmed as of its date, otherwise the judgment will be reversed and the cause remanded.

---

105 170
a204s 532

Spolek Denni Hlasatel v. Aloisie Hoffman.

1. PRACTICE—*Objections Not Made in Motion for New Trial, Waived.*—An objection to a ruling of the trial court not made in a motion for a new trial is deemed to have been waived.

2. WORDS AND PHRASES—*Libel Defined.*—A libel under our statute comprehends a malicious defamation expressed by printing or the like, tending to impeach the honesty, integrity, virtue or reputation of one living, and thereby exposing him or her to public hatred, contempt, ridicule or financial injury.

3. EXEMPLARY DAMAGES—*In Libel.*—Proof that defendant acted without malice, and merely repeated or reported what he heard from others, might be competent as mitigating damages, but not as barring the right of the plaintiff to recover exemplary damages. Where the falseness of the libel is proved, as a general rule, it is sufficient to warrant the jury in giving exemplary damages.

4. SLANDER—*Repetition of Offense May be Shown in Aggravation of Damages.*— In an action of slander, the plaintiff may prove a repetition of the slander even after the commencement of the suit in aggravation of damages.

Trespass on the Case, for libel. Appeal from the Superior Court of Cook County; the Hon. AXEL CHYTRAUS, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Affirmed. Opinion filed December 30, 1902.

Spolek Denni Hlasatel v. Hoffman.

Statement.—Appellant is a corporation publishing a newspaper printed in the Bohemian language in Chicago. In May, 1899, appellee was living separate and apart from her husband, having applied for a divorce. The 27th of that month an article appeared in appellant's paper which, after giving what purports to be a story of the courtship and marriage experiences of appellee, couched in language which is not particularly complimentary to her, and might be deemed in some respects defamatory, continues as follows: "From that time on it appears his wife (meaning appellee) slighted him, and sought elsewhere a substitute, although she had a little girl now six years old. She frequently absented herself from her home. * * * They no more than moved to their new residence when Mrs. Hoffman began to throw up to him that she did not need him any more. She herself would go out nights after nine o'clock. * * * A peculiar circumstance, however, served him (the husband) well. On the 30th of September, last year, he was alone at home with his little child, lying on his bed. He was dreaming. In that interval he saw his wife, who did not know of his presence at home, begin to make love with their neighboring saloon-keeper, Angelic. He quickly jumped up, but the seducer ran away. On that day he left the house and returned on the 3d of October, when she drove him out, saying that she had no more use for him." The remainder of the article is not now especially material, and need not be quoted.

It is charged in the declaration that by the statement that appellee slighted her husband "and sought elsewhere a substitute" it was meant and intended to charge appellee with the crime of adultery and with having sexual intercourse with a man or men other than her lawful husband; and that the statement that appellee's husband saw his wife "begin to make love with their neighboring saloon-keeper Angelic," and that when the husband jumped up "the seducer ran away," was made "meaning and intending thereby to charge the plaintiff with having had unlawful sexual intercourse with said Angelic, and meaning and

intending to charge thereby that this plaintiff and the said Angelic were interrupted in the commission of the offense of adultery.

Special pleas were filed by appellant in which the issues sought to be raised were, as stated by appellant's counsel, "first, that the language of the publication was not intended to and did not convey to the readers of the article the meaning alleged and attributed to it in the declaration; second, that the publication was a fair *bona fide* comment in a newspaper upon the conduct of the plaintiff in her public capacity; third, that the facts set out in the article were true."

The jury found a verdict in favor of appellee, awarding damages in the sum of $1,800. Judgment was entered accordingly.

FANNING & HERDLICKA, attorneys for appellant.

MALLEY & SIMS, attorneys for appellee; V. A. GERINGER, of counsel.

MR. JUSTICE FREEMAN delivered the opinion of the court.

This is an action on the case for libel. At the close of all the evidence, appellant requested the trial court to instruct the jury to find a verdict of not guilty. It is urged that the article complained of does not, either in terms or by fair inference, charge appellee with committing adultery, and that therefore the trial court erred in refusing to so instruct. It appears, however, as suggested by appellee's attorneys, that this objection was not made upon the motion for a new trial. It must be deemed, therefore, to have been waived. Ill. Cent. R. R. Co. v. Johnson, 191 Ill. 594, and cases there cited. Moreover, neither in the motion for a new trial nor in the assignment of errors is it suggested that the verdict is contrary to the evidence. But whatever may be said as to the meaning to be ascribed to the statement that appellee "sought elsewhere a substitute" for her husband, the further statement that her husband saw her "begin to make love" with another man who is called "the

seducer," amply justifies the finding of the jury that the language meant and was intended to charge appellee with the intention, at least, to have unlawful intercourse; and it is open to the further imputation also that she was interrupted in the commission of the act with "the seducer." A libel under our statute comprehends a malicious defamation expressed by printing or the like, tending to impeach the honesty, integrity, virtue or reputation of one living and thereby exposing him or her to public hatred, contempt, ridicule or financial injury. (R. S., Chap. 38, Sec. 177.) That the publication complained of comes within the statutory definition, can not, in our opinion, be reasonably open to question. The statements are made directly as of facts vouched for by appellant's newspaper upon its own responsibility. It appears also, from the evidence introduced by appellant, to have been made recklessly upon the mere statement of appellee's husband, from whom she was seeking and from whom she afterward obtained a divorce, without investigation as to the truth of the statements.

Appellant was allowed to show that the reporter who wrote the article procured the alleged information from the husband, who was, or just before had been, under arrest at appellee's instance. It is complained, however, that appellant was not allowed to introduce the conversation in detail. Objection to such evidence was sustained, and we think properly. The article published purports to state facts indorsed as such by the paper, not mere charges made by the husband. It was proper to permit appellant to show in mitigation of damages that the statements made were received from the husband, but the details of the conversation were immaterial and entirely incompetent.

It is objected that the court erred in refusing two of appellant's offered instructions which told the jury in substance that appellant was not liable unless it published the words complained of maliciously; that if the publisher believed the words to be true, though they were untrue, no recovery could be had. "Proof that defendant acted without malice, and merely repeated or reported what he had

heard from others, might be competent as mitigating the damages, but not as barring the right of the plaintiff to recover exemplary damages. In Bergmann v. Jones, 94 N. Y. 51, it was said: 'Where the falseness of the libel is proved, as a general rule, it is sufficient to warrant the jury in giving exemplary damages.'" Hintz v. Graupner, 138 Ill. 158–167. The instructions were properly refused.

It is urged that it was error to admit in evidence an article published in appellant's newspaper about two months later than that involved in this controversy, stating that this suit had been commenced, that appellee alleged the statements of the former article to be untrue, and that in order to "mend her battered reputation she asks for a plaster in the form of $10,000." We think the evidence was properly submitted for consideration by the jury. It called special attention to the former article, which it is said "she alleges" is untrue, states that her reputation is "battered," and that she is seeking a "plaster" to mend it. In an action of slander the plaintiff may prove a repetition of the slander even after the commencement of the suit, in aggravation of damages. Hintz v. Graupner, *supra*, p. 165. It is true also as to similar statements after suit commenced, that they may tend to show the intent of the first statement. Hinkle v. Davenport, 38 Ia. 355. See also Ransom v. McCurley, 140 Ill. 626; Robbins v. Fletcher, 101 Mass. 115.

There is evidence tending to show that before commencing this suit appellee called on appellant and asked for a retraction. No attention was paid to her request. The jury were justified, we are compelled to conclude, in finding that the publication was malicious. And this even though there was no actual malice toward appellee, and as is said in Ransom v. McCurley, *supra*, "there was no motive other than that willful disregard of the rights of others and the welfare of society, which is even more dangerous and reprehensible than actual malice."

The amount awarded by the jury is not so extravagant under the evidence as to justify the interference of this

court, even if a smaller sum would have been more satisfactory. It is a matter wholly within the province of the jury, and we find no evidence that the conclusion was influenced by passion or prejudice.

Finding no material error in the record the judgment will have to be affirmed.

Chicago House Wrecking Co. v. A. Durand.

1. INSTRUCTIONS—*That Because Plaintiff Mentioned Purpose for Which He Bought Materials Defendant Warranted Them for Such Purpose.*—An instruction to the jury that even though they found that the goods purchased were the identical goods selected, and were in every respect equal to the samples from which they had been purchased, still if they were not fit for the purpose for which defendant said at the time he ordered them he intended to use them, that in such case the plaintiff had a right to refuse to accept them, is not proper, for the reason that it assumes to tell the jury that because plaintiff may have mentioned that the material he was purchasing was for a house, the jury must understand that the defendant warranted the material for such purpose.

Assumpsit.—Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Reversed and remanded. Opinion filed December 30, 1902.

O'DONNELL & BRADY, attorneys for appellant.

ALDEN, LATHAM & YOUNG, attorneys for appellee.

MR. JUSTICE BURKE delivered the opinion of the court.

The declaration in this case consists of the common counts and also of a special count, averring a special contract by the terms of which the plaintiff bought of the defendant a large quantity of lumber, hardware and other building material, the freight prepaid to Blackwell, Oklahoma Territory; that the plaintiff paid the sum of $765 in advance, but that the defendant never shipped the material. The case was tried before the court and a jury and resulted in a verdict and judgment for $926.25 in favor of appellee.

The appellee, A. Durand, was a resident of Blackwell, Oklahoma Territory. He first learned of appellant company by seeing an advertisement in some farm newspaper; he wrote to the company stating that he intended to build a house, and asked for a catalogue, which was sent to him. Appellant was engaged in the business of purchasing entire stocks of material from sheriffs', receivers', manufacturers' and trustees' sales; and in February, 1899, the company wrote to Durand requesting him to send a full list of the materials he would need in the construction of his house, promising to quote him its lowest prices. Durand took the catalogue received from appellant to his contractors and had them make a list of materials he would need in erecting the cottage. Durand then sent the list to the Chicago House Wrecking Company, and requested it to put a price on the different articles. Appellant returned to him a copy of this list, with the prices marked opposite the articles, on or about February 22, 1899. Durand came to Chicago on the 12th or 13th day of March, 1899, and went to appellant's place of business at Thirty-fifth and Iron streets, where he was introduced to Mr. Newmann, a salesman in the employ of appellant. Durand had with him the said list of materials and prices and after looking through appellant's yards and the different stores of materials he came back to Newmann and said, "You have nothing here in lumber that I want. Your lumber is old stuff. I want nothing but new stuff in the building." Mr. Newmann replied, "Mr. Durand, we get all our stuff from the lumber yard over across the railroad—the Thomson lumber yard." Durand and Newmann went over to the Thomson lumber yard to see the material and Newmann pointed out piles of new lumber material necessary for the erection of the house except doors and windows, which he said they did not keep on hand, but which they had manufactured at a sash and door factory. Durand was not satisfied with the flooring, ceiling, lap-siding and shingles which Newmann at first pointed out. Newmann then showed him a better grade and also raised

the prices on the list which Durand had in his hand. The windows and doors were also to be new and Newmann said that they would be manufactured at the sash and door factory and he quoted Durand prices from the catalogue which the latter had with him. The next day, Tuesday, March 14th, Durand, for the material they had talked about the day before, agreed to pay the price of $765, which Durand then paid to the Chicago House Wrecking Company.

Through various delays, the causes of which are not very clearly shown, it was not until the fore part of May that two cars containing a lot of building material assigned to Durand were pulled onto a switch-track at Blackwell, Oklahoma Territory. Durand was notified and went to the station with teams to haul the material away but found that $192 for freight was due on the shipment and that he could not take it away unless the same was paid. The material as loaded on the two cars was in plain view. Durand describes it as follows: "The lumber was all mixed up. The scantling was full of nails and burnt ends of boards and dirt. Some doors had had glass in but the glass was broken out. The lime barrels were all busted and scattered over the cars, and so were the nails. The locks were all mixed up." Durand declined to pay the freight. On May 1, 1899, he received from appellant the following telegram: "The freight is paid." On May 3, 1899, Durand received telegram from appellant: "We will pay freight." However, appellant did not pay the freight until some time in July, and so Durand could not have gotten the material even if he had been willing to accept it. In July, 1899, the cars were unloaded by the railroad company. Several witnesses on behalf of Durand testified that the material was defective, of a very low grade, and unfit for use in building a house. They substantially agreed with the statements of Durand. The defense does not deny that the material shipped was of the kind, grade and condition described by plaintiff's witnesses, nor does it deny that the freight had not been paid as

provided in the contract of purchase and that the same was not paid until about three months after the material was shipped. But appellant introduced much evidence to show that the material shipped consisted of the identical articles selected by Durand. Durand denies that any material was ever pointed out to him as being his, or even that any particular piles were pointed out as being the ones from which his material would be selected.

The conflict of evidence in this case is so great that the instructions of law must be found to be correct, otherwise the judgment can not stand. The following instruction of law marked "Fifth," was read to the jury:

"Fifth. The court instructs the jury that where chattels are to be made or supplied to the order of the purchaser, there is an implied warranty that they are fit for the especial purpose intended by the buyer, if that purpose be communicated to the vendor when the order is given; and in this case, if you believe from the evidence that the plaintiff ordered certain goods and chattels from the defendant with which to build a house, and that the plaintiff told the defendant at the time he ordered said goods the purpose for which he intended to use the same, and that at the time said order was given the said goods and chattels had not been made or separated from the bulk or set apart to the plaintiff, and if you further find from the evidence that the goods and chattels which the defendant shipped to the plaintiff were not fit for the purposes intended by the plaintiff, then the court instructs you that the plaintiff had a right to refuse to accept said goods and chattels."

Counsel for appellee in stating appellee's theory of the case say that no specific chattels were agreed upon or sold to appellee, but that the material he was to get was to correspond in kind, description and fitness to the samples that had been shown to him; and yet counsel insists, notwithstanding this, that because appellee made the statement that this material was to be used in the erection of a cottage that therefore the material to comply with the contract must be fit for the erection of a cottage. We can not subscribe to such a proposition without qualifications. It may well be said that appellee was not a competent person to select a sample for building materials which should be fit

for the erection of a house. Under plaintiff's evidence and counsel's theory of the case appellee ought not to recover unless the evidence shows that he did not receive the materials which corresponded in kind, description, and fitness to the samples that had been shown him. From plaintiff's evidence it appears that he had no idea that an express warranty had been given him; and in fact the skilled pleaders who drew the declaration in this case had no thought of declaring upon an express warranty for they have failed so to do. This judgment of $926.25 can not be sustained if recovered under any one of the common counts. If recovered for money had and received, there is no evidence on which to base so large an amount.

So that if the judgment can be sustained it must be under the special count. But this count is only to recover the purchase price of a large quantity of building material for which appellee bargained and paid in advance but which appellant failed to deliver; and also damages for breach of the contract. It certainly can not be said that there is anything in this count which, under any state of the evidence, would justify a verdict and judgment in any amount because of a failure in express warranty, for the count is not framed upon a theory which will allow a recovery under an express warranty.

Now, in view of the state of the pleadings what relevancy to the case had the fifth instruction? By reading the fifth instruction to the jury the court said to them that even though they found that the goods purchased were the identical goods selected and were in every respect equal to the samples from which they had been purchased, still if they were not fit for the purpose for which defendant said at the time he ordered them he intended to use them, that in such case the plaintiff had a right to refuse to accept them. The instruction is not proper under the evidence of the case, and is erroneous for the further reason, that it assumes to tell the jury, that, because appellee may have mentioned that the material he was purchasing was for a house, the jury must understand that the appellant war-

ranted the material for such purpose. This instruction should not have been given. Besides the objections to it already stated it tended to divert the minds of the jury from the issues made by the pleadings and by the evidence. As the judgment must be reversed and the case retried, we refrain from expressing an opinion on the evidence or any part thereof. Judgment of the Superior Court is reversed and the cause remanded.

Josef Kozacek v. Ottilie Kozacek.

1. EQUITY PRACTICE—*Chancellor May Submit Questions of Fact to a Jury.*—It is within the discretion of the chancellor to submit to a jury questions of fact, but such submission does not deprive the parties of the judgment of the chancellor; he may accept or reject the advice of the jury.

Divorce.—Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Affirmed. Opinion filed December 30, 1902.

KOHOUT & JANDUS, attorneys for appellant.

FREDERICK S. MCCLORY, attorney for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

This is an appeal from a decree adjudging appellee entitled to separate maintenance. Appellant filed a bill for divorce from appellee, his wife, upon the alleged ground of desertion. Thereupon the wife filed an answer denying the charges in the bill, and filed also her cross-bill alleging cruelty, and that when pregnant she had been driven in the night by appellant from his home, and had since been living separate and apart from her husband without her fault, compelled as best she could to earn a living for herself and her children.

Issues were formulated and submitted to a jury, which found appellee not guilty of desertion as charged in the

original bill, and found also that at the time of filing her cross-bill, appellee was living separate and apart from her said husband without her fault as in said cross-bill charged. The decree was entered accordingly.

We are urged to set aside this decree on the alleged ground that it is based upon a verdict contrary to the evidence; that the great weight of evidence proves appellee guilty of desertion. No errors are pointed out in the admission or rejection of evidence, and while the testimony is conflicting, there is evidence fully warranting the conclusion which the jury reached. No ground exists, so far as we can discover, for interference by this court with the finding of facts, approved as it was by the court which saw the witnesses and heard the testimony. Upon the issues raised by the cross-bill, the jury expressly found that appellee was living separate and apart from her husband without her fault.

It is said that as the statute makes no provision for a jury trial in suits for separate maintenance it was error to submit to them the issues upon the cross-bill. It was within the discretion of the chancellor to submit to a jury questions of fact. Such submission does not deprive the parties of the judgment of the chancellor. He may accept or reject the advice of the jury. In this case he accepted it and we find no reason in the evidence to question the propriety of his action. It was charged in the cross-bill that appellant had been convicted in the Criminal Court of having unlawfully and without good cause abandoned and neglected and refused to maintain and provide for his wife and child, and the conviction is admitted in appellant's answer. Two courts and juries appear, therefore, to have passed upon issues here involved, in both cases adversely to appellant. These matters may properly be deemed settled so far as this court is concerned.

It does not appear that the decree formally disposes of the original bill, but it finds that the allegations in said bill are not true, and denies appellant the relief which he by said bill sought. This sufficiently disposes of it, although

the wording of the decree might have been more explicit. It is, however, final, so far as the original bill is concerned.

The decree provides for payment by appellant of $5 a week to appellee until the further order of the court. This was within the power of the chancellor, and for aught that appears it is a proper exercise of his discretion to still retain control of the cause.

The decree of the Superior Court will be affirmed.

William S. Rush v. Garah M. Flood, formerly Garah M. Rush.

1. WORDS AND PHRASES—*Alimony Defined.*—Alimony is an allowance to a wife by order of court on account of her, without her fault, living separate and apart from her husband.

2. ALIMONY—*Order to Pay for Support of Child is Not.*—An order to pay for the support of children is not an award of alimony.

3. BANKRUPTCY—*Order upon a Father to Support His Child of Tender Years.*—An order upon a father to support his female child of tender years can not be discharged under bankruptcy proceedings.

4. SAME—*Order to Reimburse a Stranger for Past Support of Child is Discharged by.*—The obligation of a man to recompense his former wife for expenditures made after she had remarried, for the benefit of their child, is like that of his obligation to recompense any other person, who had contributed to the support of his minor child. It is but a civil debt and is discharged by the father's discharge in bankruptcy proceedings.

Contempt of Court.—Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Reversed. Opinion filed December 30, 1902.

CHARLES A. BUTLER, attorney for appellant.

JOHN J. COBURN and GEORGE A. MEACH, attorneys for appellee.

MR. PRESIDING JUSTICE WATERMAN delivered the opinion of the court.

From the intelligent and orderly brief of appellee we

gather that May 14, 1900, appellee filed a petition showing that some years previous she had been divorced from appellant; that by arrangement between the parties a decree was therein entered giving to her a fixed sum, namely, three hundred dollars as alimony, and fifty dollars for her solicitors.

In said petition she set forth that the alimony and solicitor's fees so agreed upon had never been paid to her; that since the divorce she has supported her minor child without aid from appellant and she asked that he be ordered to pay her five dollars a week for her past support of the child, and also five dollars per week for the future.

In said petition she sets forth that since her divorce she had married again and that her then husband received an income not exceeding ten dollars per week. To this petition appellant replied admitting the agreement to pay three hundred dollars alimony and fifty dollars attorney's fees, and asserting that he had paid the same, and denied that appellee had, since the divorce, the care and custody of their child, and asserted that the child resided with and was clothed and educated by him for a long time after the divorce.

On the 11th day of July, 1900, a decree was entered in pursuance of said petition, among other things, as follows:

"It is ordered, adjudged and decreed, that the said defendant, William S. Rush, pay to the complainant, Garah M. Flood, formerly Garah M. Rush, on account of the past support of their child for two years' board at convent, the sum of three hundred dollars; on account of board while at home and being supported by complainant, the sum of one hundred and fifty dollars; for clothes for three years and more, and extras at convent, etc., the sum of two hundred and fifty dollars, amounting in all to the sum of seven hundred dollars.

And it is further ordered, adjudged and decreed, that the defendant pay to the said complainant the sum of four dollars per week for the present and future support of said child until the further order of this court, the first payment thereon to be made on Monday, July 16, A. D. 1900, and the subsequent payments to be made on each Monday thereafter."

Thereafter, on the 23d day of July, 1901, appellee filed an affidavit and application setting forth that appellant had not paid her the sum of $700 for the support of their child, Garah M. Rush, nor any portion of the same; that he has ample means with which to pay such sum and therefore she prayed that a rule might be entered against him to show cause why he should not be attached for contempt of court for his neglect and refusal to pay the amount of said decree, to which rule appellant answered, setting forth many details of his financial condition, insisting that he had no means, was entirely unable to pay any portion of said decree, was indebted to his employers and others for expenses necessarily by him incurred in support of himself and his family, he having married since the divorce from appellee, and setting forth also that August 18, 1900, he filed a petition in bankruptcy in the United States Court, scheduling, among other things, the indebtedness to appellee of $700 by virtue of said decree, and that on October 22, 1900, he was discharged by the bankrupt court from all his debts scheduled.

The court, after hearing evidence, found that no sufficient cause had been shown by the respondent why the decree of the court ordering him to pay $700 to appellee should not be complied with by appellant, or at least in part, and finding appellant able, and that he had means wherewith to pay a part of the said decree, and that he willfully refuses to obey the order embodied in the decree of the court, and that from the evidence offered it appears that he is able to pay at least $50 of the amount of said decree. Whereupon the order proceeds:

"It is therefore ordered, adjudged and decreed by the court that the said respondent, William S. Rush, be, and is hereby, declared guilty of contempt of this court for his willful refusal to comply with the decree of this court entered of record July 11, 1900."

"It is further ordered, adjudged and decreed that the said respondent, William S. Rush, pay unto the said complainant, instanter, the sum of fifty dollars for and on account of the said decree of July 11, 1900; and the said

respondent, William S. Rush, having defaulted in the payment of the said fifty dollars to said complainant, so ordered to be paid by him, it is further ordered that the said respondent, William S. Rush, be committed to the county jail of Cook county, Illinois, there to remain until he pays the said sum of fifty dollars to the said complainant, or until released by due process of law, but not to exceed the period of six months; and that a mittimus issue forthwith, directed to the sheriff of Cook county, Illinois."

To which order the respondent excepted, and from which order this appeal is prosecuted by appellant.

Appellee calls our attention to a number of decisions holding that a decree for alimony is not an indebtedness from which a party may be discharged in bankruptcy. The courts thus holding proceed upon the theory that alimony rests not so much upon a contract entered into by the husband as upon a duty resting upon him as a result of the marital relation.

Alimony is an allowance to a wife by order of court on account of her, without her fault, living separate and apart from him. Bouvier's Law Dictionary.

An order to pay for the support of children is not an award of alimony. Bishop on Marriage, Divorce and Separation, Vol. 1, section 1386, Vol. 2, section 1213; Foote v. Foote, 22 Ill. 425; Bergen v. Bergen, 22 Ill. 189; Stillman v. Stillman, 7 Ill. App. 529.

The duty upon a father to support his minor female child of tender years is certainly equal to the moral obligation of a husband to support his wife. Such child must be supported by some one who is capable of maintaining it, while a wife may be able to support herself; it would seem, therefore, that the principle upon which courts have proceeded in holding that alimony can not be discharged under bankruptcy proceedings applies equally to an order upon a father to support his child of tender years, although from the report of Dunbar v. Dunbar, Supreme Judicial Court of Massachusetts, 62 N. E. Rep. 248, there seems to have been a holding by a *nisi prius* court that an order relating to the support of a son was discharged by bankruptcy proceedings.

In the present case there is no contention over that portion of the decree of July 11, 1900, ordering appellant to pay to the complainant the sum of $4 per week for the present and future support of said child. So far as appears that has been paid; indeed, appellant adduces the payment of said $4 per week as one reason why his financial condition does not permit of his paying any portion of the decree awarding to appellee $700 in payment of expense gone to by appellee, for, at the time of said decree, the past support of their child.

At the time appellee expended the $700 for the support of her and appellant's child she was not his wife, but married to another man. In law she was thus a stranger to appellant and his obligation to recompense her for expenditures she had made in behalf of their child was like that of his obligation to recompense any other person, who had contributed to the support of his minor child. Nor does it appear in this proceeding that at the time appellee expended such $700 he was unwilling to provide for their child at his own home or some other suitable place. The obligation of appellant to pay to appellee the $700 expended by her was but a civil debt and the decree ordering him to pay the same did not make it otherwise. Indeed, had the $700 been advanced by a bank we think it would hardly have been contended that appellant was under an obligation to pay the bank, which could be enforced by imprisonment, nor has it been shown to us why such mere civil debt to one in law a stranger to the debtor may not be discharged in bankruptcy.

There is in this state no such thing as imprisonment for debt, while, if one is possessed of property not exempt from execution which he ought and unjustly refused to surrender in satisfaction of a judgment against him, after execution upon such judgment has, upon personal demand, been returned no property found and unsatisfied, such refusal to surrender property is regarded as a fraud, and proceedings may be had under which he may, for a limited time, be imprisoned at the expense of such judgment creditor; but

before he can be so imprisoned, such debtor is entitled to a hearing and a trial by jury as to all the facts alleged, and especially as to the fraud with which he is charged. In the present case, appellant, without having an opportunity for a trial by jury, has been ordered to be imprisoned for his failure to pay a merely civil debt.

In saying what we have, we do not wish to be understood as expressing any opinion as to the validity of the order requiring him to pay $700 to appellee for the past support of their child.

The order of the Superior Court is reversed.

George Barrie & Son v. Mrs. Albert C. Frost.

1. STATUTES—*Sec. 10, Ch. 98, R. S.*—Sec. 10, Ch. 98, R. S., provides that fraud or circumvention used in obtaining the making or executing of even a negotiable instrument, may be pleaded in bar to any action brought on such instrument so obtained, whether such action be brought by the party committing such fraud or circumvention or by any assignee of such instrument.

2. FRAUD—*Is Never Presumed.*—Fraud is never presumed; the burden of establishing fraud is upon him who asserts it.

Assumpsit, upon a contract of subscription. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Affirmed. Opinion filed December 30, 1902.

DANIEL S. WENTWORTH, attorney for appellants.

CHARLES ALLING and JAMES F. HUTCHISON, attorneys for appellee.

MR. PRESIDING JUSTICE WATERMAN delivered the opinion of the court.

This was an action of assumpsit, based upon the following writings:

"To MESSRS. GEORGE BARRIE & SON, GEO. A. KILBORN, GEN. AGT:

I hereby subscribe for, and you agree to deliver, one com-

plete copy of Historical Memoirs, Second Series, in twelve volumes, Japan Vellum Edition, as issued, for which I agree to pay, on delivery, $10 per volume. Only one thousand copies on Japan Vellum guaranteed. To correspond with sample. MRS. ALBERT C. FROST.

Dated Oct. 20, 1900."

Upon the reverse side of said contract appears the following:

"Please to state any special conditions, if any, on this contract, so there may be no misunderstanding. Contract can not be canceled. State when to be delivered."

And immediately below this, in the handwriting of Mrs. Frost, appears the following:

"I wish this work delivered, when it is completed, at the same price as my first work—$120, less five per cent for cash. To be marked as my first twelve; to be marked thus: Albert C. Frost."

Upon the trial it appeared by the testimony of appellee, that, having made with appellants a written contract for a complete copy of Historical Memoirs, in twelve volumes, at $12 per volume, such subscription and contract by her having been made through the agency of a Mrs. George, a canvasser employed by appellants, thereafter, the same canvasser, still in the employment of appellants, called upon her three or four days after she had made the said contract, and informed her that a lady on the Lake Shore Drive had just given her an order for two sets of the same book with her monogram, and asked appellee if she would not like to have her monogram, to which appellee replied, "I certainly would like to have my monogram;" to which agent of appellants replied, "You will have to sign for another set and I will cancel the first set; another set in place of the first set." Whereupon appellee signed.

Appellee further testified:

"I thought it would be the same as my first with the monogram. I wrote and signed what she dictated; I only intended to order the first set. I had a caller at the time and I thought she was thoroughly honest, and I just signed what she told me to. She made me sign for the second edition."

Appellants do not appear to have, before bringing suit, tendered a delivery of the books, although it does appear by evidence, to the introduction of which appellants objected, that appellee refused to take more than one set of books, and thus a formal tender of the same was waived, and it was not necessary that appellants should do more than offer to deliver the second set. There was no denial of the truth of the testimony of appellee.

The jury returned a verdict for the defendant upon which there was judgment. Appellants contend that the court improperly allowed appellee to introduce evidence varying the terms of a written contract. We do not regard the evidence introduced by appellee as offered for the purpose of varying the terms of a written contract, but rather offered as tending to show that appellee was induced by the fraud and deception of appellants' agent to sign a paper without understanding its terms.

In Linington v. Strong, 107 Ill. 295, the court approved of the following instructions:

"The law requires every person to exercise reasonable prudence in business affairs, and before relieving a party from the obligation of a contract upon the ground of fraud it must appear that he exercised reasonable care and prudence to learn the nature of the contract before executing it. If the defendant could read and had an opportunity to read the contract before signing, it was his duty to do so, unless induced not so to do by willfully false statements of the plaintiffs, or one of them, as to its being a copy of the original, and if the defendant had full opportunity to read the contract before signing and was not induced to sign it by false statements made by plaintiffs, or either of them, the defendant would not be permitted to deny knowledge of the contents thereof."

The statutes of this state, section 10 of chapter 98, especially provide that fraud or circumvention used in obtaining the making or executing of even a negotiable instrument may be pleaded in bar to any action brought on such instrument so obtained, whether such action be brought by the party committing such fraud or circumvention or any assignee of such instrument. In the present case appellee

could read and had apparently a reasonable opportunity to read the unnegotiable instrument she signed, and unless she were by the fraudulent representations or conduct of appellants' agent induced not to read the instrument she signed, she is bound thereby.

There was evidence upon the trial of this cause tending to show that the arrangement under which she signed the instrument in question was that the order she had previously given for a set of Memoirs was to be canceled and set aside; indeed, the material consideration and inducement moving her to sign the instrument upon which suit was brought, was the agreement of appellants through their agent to set aside the first order and give her in place thereof the same work having thereon her monogram. It is uncontradicted that the contract upon which this suit was brought was made upon the consideration that the former contract for the same books should be canceled. Appellants urge that their agent had no authority to cancel the first contract; that it is still existing and appellee bound to take and pay for duplicate sets of ten volumes of these "Memoirs," each costing $120. If the first contract or order be uncanceled, then the consideration and the inducement for the signing by appellee of the second order has failed, or rather the second signing was without consideration. The obligation of appellee to pay for one set of the "Memoirs" is not disputed. She denies only any obligation to pay for two sets. Appellants did not attempt to contradict the testimony of appellee given upon the trial. If what she said was untrue, if she were not by the representations of their agent induced not to read the contract she signed, or if the consideration for such signing was not the cancellation of the order she had previously given, they could have called their agent, Mrs. George, to contradict her. This they failed to do.

The jury had before them the testimony as to what occurred and the circumstances under which the writing upon which suit was brought was signed. Appellants call attention to the statement in the instrument signed by

appellee, "Contract can not be canceled." If by this is meant that the contract could not be canceled at the will of one party thereto, it was but stating a familiar principle of law. If by it was meant that it could not be canceled by the consent of both parties thereto such a contract would have a significance which could not be given to it by the agreement of the parties. Appellants might perhaps have had inserted in the contract that it could not be canceled except by the written consent of their firm; this they did not do.

Fraud is never presumed; upon him who asserts fraud is the burden of establishing the same. We are not prepared to say that if appellants' agent had appeared and contradicted the testimony given by appellee, it would not have been the duty of the jury to have found for appellants. As it is, we think the jury were warranted in coming to the conclusion it did, and that the court neither in giving nor in refusing instructions, or otherwise, committed any error for which this judgment ought to be reversed. It is therefore affirmed.

City of Chicago v. John B. Vesey.

1. EVIDENCE—*Of Conditions of Defective Sidewalk Subsequent to Injury.*—Evidence of the condition of a sidewalk at a time subsequent to the injury complained of, is inadmissible.

2. SAME—*That Another Person Has Subsequently Been Injured by a Defective Sidewalk.*—Evidence of an accident happening subsequent to the injury to the plaintiff is inadmissible; it does not tend to show that prior to the accident to the plaintiff the city had notice that the sidewalk was in a defective condition.

3. SAME—*Photographs, When Admissible.*—Photographs may be received in evidence under certain circumstances to assist the jury in understanding the case, provided they are verified by proof as being true representations of the subject. Whether an offered photograph has been shown to be so correct a representation as that it should be admitted is addressed to the discretion of the trial court.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge presiding.

Heard in the Branch Appellate Court at the October term, 1901. Reversed and remanded. Opinion filed December 16, 1902. Rehearing denied January 6, 1903.

Appellee obtained a verdict and judgment for $6,000 in an action against the City of Chicago for injuries received by him while walking south on the east side of Stony Island avenue in the evening of February 2, 1897. In crossing Seventy-first street, Mr. Vesey stumbled over a rail of the Illinois Central Railroad and was injured. Stony Island avenue crosses Seventy-first street. At the point of crossing this avenue is 200 feet wide, and runs north and south; Seventy-first street extends east and west. The Illinois Central Railroad, with double tracks, occupies Seventy-first street at this crossing. On the west side of the avenue there was a good walk made of brick, across Seventy-first street from the north to the south edge of Seventy-first street, except between the north and south rails of the Illinois Central tracks, between which there was a good plank sidewalk, practically level with the rails of the track.

On the east side of Stony Island avenue, north of Seventy-first street, was a twelve-foot plank sidewalk to the north side of Seventy-first street, and from this walk two or three planks had been laid on the ground extending into Seventy-first street, toward the rails of the Illinois Central tracks. At the time of the accident the north ends of these planks, that is, the ends next to the sidewalk, were two or three inches below the plank sidewalk, and could barely be seen. The rest of the planks, that is, the portion extending south, where teams, going along Seventy-first street, close to the Illinois Central tracks, crossed the planks, were covered with sand and dirt, and lower than at the ends next to the plank sidewalk. The north ends of the ties of the Illinois Central were not covered and projected up above the ground several inches, and the rail on these ties, being about four inches high, made an obstruction to a person passing along on Stony Island avenue, across Seventy-first street, several inches high. Between the railroad tracks

were cinder paths. The nearest light at the time of the accident was the electric light, 200 feet across the street, of the Illinois Central platform. There was no other light, except a street light a block or more away. Mr. Vesey, stumbling over the north rail of the Illinois Central track, plunged forward and fell, striking his knee on the edge of the other rail.

ANDREW J. RYAN, city attorney, GEORGE GORMAN, assistant city attorney, attorneys for appellant; JAMES J. KELLY, of counsel.

CASTLE, WILLIAMS & SMITH, attorneys for appellee; BEN M. SMITH, of counsel.

MR. PRESIDING JUSTICE WATERMAN delivered the opinion of the court.

Upon the trial a witness, called by appellee, after testifying to the condition of the sidewalk at the time of the accident, was permitted by the court, over the objections of the defendant, to testify that about the middle of the month of March, after the accident to the plaintiff, in February, he, this witness, at the same place stumbled and fell. He was then asked as to the condition of the walk at the time that he fell, and, over objection of the defendant, was permitted to testify that it was in about the same condition that it was six or eight weeks prior to that, and also that there was not any change that he could see. Upon cross-examination the witness stated that he was going across and fell; that his toe caught under the north rail of the north line and threw him on his face; that this accident happened to him about dusk in the evening.

This court has at this term, in the case of City of Chicago v. Early, held that the condition of the sidewalk at a time subsequent to the injury complained of in that cause was properly excluded. In so doing, we followed the action of the Supreme Court in Howe v. Medaris, 183 Ill. 288–295, and of the Appellate Court in Alabaster Co. v. Lonergan, 90 Ill. App. 353.

In the 11th Am. and Eng. Ency. of Law, 483, it is said:

"By the weight of authority, evidence that another person had previously met with an accident as a result of the same defect is admissible, to show the length of time the way had been out of repair, as bearing upon the question of notice; and reasonable presumptions and inferences may be indulged in this as in other cases."

Evidence of an accident happening subsequent to the injury to the plaintiff did not tend to show that prior to the accident to the plaintiff, the city had notice that the sidewalk was in a defective condition.

Neither evidence—as to a subsequent accident nor as to the condition of the walk at a time six weeks subsequent to the accident to the plaintiff, should have been admitted.

A photograph of the place of the accident, taken by the daughter of the plaintiff, an amateur photographer, more than two years after the happening of the injury was, over the objection of the defendant, admitted in evidence.

The photographer testified: "I had never been across that place before the night of the injury."

"Q. From what point is that picture taken? A. It is taken from the walk.

Q. And the picture represents the north rail of the north track? A. Yes; and it was taken low down to the ground.

Q. Now, show on there where you took that picture. A. I was standing on the edge where the ground goes over the board.

Q. Did you go down to that place after the accident occurred—after the injury? A. I went down to the place the next morning on my way to the university.

Q. Did you look at the place then and notice it carefully? A. Yes, sir; I did.

Q. Was it in the same condition the next morning as it was when the picture was taken? A. Yes, sir; it was just exactly the same, as near as it could be.

A motion to strike this answer out was denied.

Q. Was it the same or not? A. As near as possible.

The Court: What do you mean by 'as near as possible?'

A. As near as I could remember it was exactly the same.

The Court: The objection to the photograph is overruled."

In Cleveland, C., C. & St. L. Ry. Co. v. Monaghan, 140 Ill. 474, the court say:

"There are authorities which hold that photographs may be received in evidence under certain circumstances to assist the jury in understanding the case, provided they are verified by proof as being true representations of the subject."

In that case the court refused to interfere with the action of the trial court in excluding an offered photograph. As is said by the Supreme Court of Connecticut in Cunningham v. Fair Haven Railway Company, in respect to an offered photograph:

"It is common knowledge that as to such matters, either through want of skill on the part of the artist, or inadequate instruments or materials, or through intentional and skillful manipulation, a photograph may be, not only inaccurate, but dangerously misleading."

From an examination of the photograph appended to the record in this case, it would seem that the rail of the track of the Illinois Central Railroad Company at Seventy-first street forms, or is upon, an embankment about three feet in height. This is contrary to the testimony of all the witnesses who described the place of the accident. Although the question as to whether an offered photograph has been shown to be so correct a representation as that it should be admitted is addressed to the discretion of a trial court, nevertheless, while the admission of this photograph does not constitute reversible error, we feel that, taken as it was, by an amateur, more than two years after the accident, and at variance with testimony given by each party, it is such that it ought not, under the circumstances, to have been admitted.

The judgment of the Superior Court is reversed and the cause remanded.

L. R. Ermeling v. Gibson Canning Co. et al.

Same v. Wesley S. Guy et al.

Same, doing business as L. R. Ermeling & Co. v. Isaac Horner et al.

1. FACTORS—*Have Lien upon Goods in Their Possession.*—A factor has a lien for his disbursements, commissions and advances on the goods in his possession. He can not acquire a lien upon goods or other proceeds by making advances after the possession of the goods has passed to a purchaser.

2. PRACTICE—*Assignee of Chose in Action Must Sue in Name of Assignor.*—A factor who sells in his own name the goods intrusted to him for sale and advances the price to the owner, loses his lien and becomes merely an assignee of a chose in action, and, his principal being known, he must bring suit in his principal's name for the purchase price.

3. SAME—*Waiver of Tort by Bringing Action in Attachment.*—One who brings an action of attachment against a party accused of a fraud in purchasing goods, affirms the sale to him and can not proceed against him for the tort.

Attachment, Assumpsit, and Bill of Interpleader.—Three cases consolidated. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Affirmed. Opinion filed December 10, 1902. Rehearing denied January 6, 1903.

JOHN S. MCCLURE and A. M. LASLEY, attorneys for appellant.

HAMLINE, SCOTT & LORD, attorneys for appellees.

MR. PRESIDING JUSTICE WATERMAN delivered the opinion of the court.

A communication dated Milwaukee, Wisconsin, October 23d, signed "W. S. Guy," was upon that day telegraphed to the Gibson Canning Company at Gibson City, Iowa, upon the strength of which and communications previously had between the Canning Company and some person signing himself "W. S. Guy," the Gibson Canning Company on the 26th of October, 1900, shipped to Wesley S. Guy, at

Milwaukee, one car of canned corn, consisting of 700 cases, and invoiced the corn at sixty-five cents per dozen, less freight. When this car of corn arrived at Milwaukee, some person representing himself as the consignee, or acting for him, had the corn shipped by boat to C. Lamb, in Chicago, where it arrived November 1, 1900.

L. R. Ermeling, appellant, at that time was, and for some time prior thereto had been, in the commission business in the city of Chicago, and had for two or three years before this, been acquainted with a man by the name of C. Lamb, and another man by the name of Bunn, and had prior to this time done business for them, Lamb and Bunn.

Upon the arrival of the corn in Chicago, Lamb and Bunn went to Mr. Ermeling's place of business and asked him to handle the corn; and there entered into a contract with him, agreeing to pay him ten per cent commission to handle the corn for them, which Mr. Ermeling agreed to do. Mr. Lamb indorsed the bill of lading and Mr. Ermeling sent to the dock for, and had brought to his place of business, twenty-five cases, from which he took samples and went out to sell the corn—Lamb and Bunn limiting him to sixty-five cents, minimum selling price. Among other places, Ermeling went to that of Horner & Company, appellees. From them he received an offer of fifty-eight and one-half cents and reported this to Lamb and Bunn, who told him to sell it to Horner & Company at that price; whereupon he communicated his acceptance of their offer to Horner & Company and delivered them the corn.

Ermeling made the sale to Horner & Company in his own name, paid the freight on the goods to the Goodrich Transportation Company and paid for delivering the goods to Horner & Company. The sale was a cash sale, but under the custom of the street, ten days are allowed for payment upon such sales. Ermeling testifies that he made the sale to Horner & Company the first of November; that after he had made the sale, Lamb and Bunn told him they would like to have the money; that he told them that the goods were sold for cash in ten days, but that he would

advance them the money, and that on the first of November, he gave them $100; that the goods were delivered to Horner & Company the 2d and 3d of November; that he saw Lamb again on the 5th of November and on that day gave to Lamb and Bunn the balance of the purchase price, deducting his disbursements and commissions. About the middle of November, the president of the Gibson Canning Company came to Chicago and saw Ermeling, who told him that he had paid Lamb and Bunn for the corn. Lamb and Bunn have disappeared, and so far as is known, at the time the goods were ordered from the Gibson Canning Company, there was residing in Milwaukee no such man as Wesley S. Guy. Some time previous there had been there a responsible merchant, bearing that name; he was not living at the time the goods were ordered of the Canning Company. In October or November, 1900, there was in Milwaukee a man at a vacant store, number 428 Market street, who went by the name of W. S. Guy. This man, having the freight bill for the corn shipped by the Canning Company to W. S. Guy, gave it to a teamster, who therewith got the goods, and as ordered by Guy, took them to the dock of the Goodrich Transportation Company in Milwaukee; from thence they were by Guy consigned to "C. Lamb, Chicago." It seems probable that Lamb went to Milwaukee and communicated with the Canning Company, using the name of W. S. Guy. Ermeling testifies that he paid Lamb and Bunn with cash and checks drawn to the order of currency. November 20th, the Gibson Canning Company brought suit in attachment against Wesley S. Guy and against Ermeling and Horner & Company, as garnishees, filing interrogatories for them to answer. On the 17th of December, Ermeling filed answers to the interrogatories propounded to him, each being answered in the negative. Horner & Company did not file answers to the interrogatories propounded to them until the 12th day of June, 1901. No replication was filed by the Gibson Canning Company to the answers of Ermeling until the 12th day of June, 1901. Upon the

12th day of June, 1901, the Gibson Canning Company filed its replication to the answers of Horner & Company. November 21, 1900, Ermeling began in the Superior Court an action in assumpsit against Horner & Company. December 12, 1900, Horner & Company filed in the Circuit Court a bill of interpleader against W. S. Guy, L. R. Ermeling and the Gibson Canning Company, asking that said defendants be required to interplead, and for an injunction against the Gibson Canning Company and Ermeling from prosecuting their respective suits against them, the complainants.

December 16th, Ermeling appeared in court and stipulated to stay his suit against Horner & Company until the disposition of the interpleader cause.

February 15, 1901, Ermeling filed an answer to the bill of interpleader, February 6, 1901, the Gibson Canning Company answered the bill of interpleader. June 5, 1901, Horner & Company filed their replication to these answers. On the 5th of June, 1901, counsel for all parties being present in the Circuit Court before Judge Dunne, Mr. Hamline, of the Gibson Canning Company, stated that it was ready to have the money owing by Horner & Company paid into court, and have an arrangement made by which all the issues could be heard at one time.

Counsel for Ermeling asked: "Are you willing to so stipulate?"

Mr. Hamline: We are willing to have an order entered, a jury summoned, and this attachment case tried, and if we win the money that Horner had, it shall be paid over to us, and if we lose the money Horner had, it is to be paid to them.

Mr. Lasley: We will submit it to this court on that proposition.

"Mr. Hamline: Subject to the right of appeal.

Mr. Lasley: Or waive the right to a jury and submit it to this court.

The Court: The two common law cases are consolidated with this case, and this court enters a final order that will dispose of all the equities and legal rights of the parties. Is that satisfactory to all?

Mr. Hamline: Yes.

The Court: Do you want the issues of fact tried by a jury?

Mr. Hamline: I don't know what the practice is.

The Court: We will make the order now; by stipulation of the parties, two cases at common law are consolidated with this case, and all three cases are consolidated in this court; the jury is waived on the common law issues and all issues submitted to this court for final determination, and the court to enter any such order in law or equity as the interests of the parties shall demand, subject to the right of appeal.

Mr. Lasley: In this interpleader case, if the interpleader should stand, Mr. Whitney says he will claim no solicitor's fees; that he will pay it in full."

Counsel for Ermeling, appellant, insist that the final orders of the Circuit Court are not binding upon him, because the issues in the attachment suits were not made up by the filing of replication until the 12th day of June, 1901.

The Circuit Court had jurisdiction in the matter of the bill of interpleader filed by Horner & Company. This jurisdiction was submitted to by Ermeling when he filed his answer to such bill. The only purpose of the interpleader was to stop the proceedings in the two suits brought against Horner & Company and to have all the matters therein involved determined under the bill of interpleader. Not only was the jurisdiction in the matter of interpleader submitted to by Ermeling and the Gibson Canning Company, but it was in open court agreed that the Circuit Court might proceed to hear, determine and render final judgment as to all matters involved in the three suits. This it did. Under this agreement, made in open court, it is immaterial whether the issues in either of the cases at law had been fully determined or not. It is insisted by counsel for Ermeling that the Gibson Canning Company, by bringing this suit of attachment against W. S. Guy and making Ermeling and Horner parties defendant thereto as garnishees, affirmed the sale to Guy, and thus the possession which Lamb and Bunn had to the corn and the title thereto claimed by them, and that from this it follows

that Ermeling, being a factor employed by Lamb and Bunn, having received the possession of the goods by the transfer of the bill of lading issued by the carrier in whose custody they were, had a lien on the goods for his disbursements, commissions and advances. A factor has a lien for his disbursements, commissions and advances on the goods in his possession. He can not acquire a lien upon goods or other proceeds by making advances after the possession of the goods has passed to a purchaser. Ewell's Evans on Agency, marginal paging 364; Robinson v. Larrabee, 63 Me. 116; Spalding v. Adams, 32 Me. 212; Byers v. Danley, 27 Ark. 77.

Ermeling testified that he made the sale on the first of November; that on the first of November he advanced to Lamb and Bunn $100; that he thinks the goods were taken over to Horner & Company the second and third; and that he gave them the balance of the money November fifth. At least two days before that, possibly more, the transaction between Lamb and Bunn, and Horner & Company, so far as the sale and delivery of the goods is concerned, was closed. Horner & Company were, according to the testimony of Ermeling, then the debtors of Lamb and Bunn for the purchase price of goods; already fully delivered, by an advance at that time made by Ermeling, he acquired as to such advance only the rights of an assignee of a chose in action, and did not acquire a lien on the purchase price, although he did in equity acquire the right which Lamb and Bunn then had to have the indebtedness of Horner & Company paid to him. Congress Construction Company v. Farson & Libbey Co., 101 Ill. App. 279.

The question is not whether Lamb and Bunn might not have sold and conveyed a good title to these goods to Ermeling, because this was not attempted. While it is true that the sale to Horner & Company was made by Ermeling in his own name, and had not his principals been disclosed, he might have maintained a suit in his own name, yet, it appearing that he was but an agent acting for Lamb and Bunn, the indebtedness of Horner & Company was not to him but to Lamb and Bunn. Ermeling's right of action, as to ad-

vances, made after he ceased to be a factor, was only to bring suit in the name of Lamb and Bunn against Horner & Company. Ewell's Evans on Agency, star paging 382–396–402.

It is true, as is urged by appellant, that the Gibson Canning Company, having brought an action of attachment against Guy, thereby affirmed the sale to him and can not proceed against him for the tort of which he seems to have been guilty. The comments in Hunter v. Prinsep, 10 East, 378, upon the rule as to such matters are suggestive.

We are not, however, prepared to hold that such action amounts to a recognition that title to the property passed to Lamb, Bunn or Ermeling, and that it must recognize the liens upon the goods claimed to have been created by their action. As before stated, it has not been shown that Guy did more than to consign the goods to Lamb.

If Ermeling had been able to show that Lamb, under the name of Guy, bought these goods, or that Guy authorized Lamb to sell them, it would have appeared that he, Ermeling, was a factor of the owner or one authorized to sell and thus might have had a valid lien. The case is not that of an asserted lien for something essential to the preservation of the property, as for storage, but of a lien claimed to have arisen out of a sale by one as to whom it is conjectured, only, there may have been given authority to sell by the party guilty of the fraud, this lien being asserted against the party defrauded.

It is insisted by counsel for the Gibson Canning Company that Ermeling was a party to the fraud carried on by Guy, Lamb and Bunn, and that he has never paid Lamb and Bunn as he claims.

Ermeling, in his answer to the bill of interpleader, says that he was at no time the agent of Wesley S. Guy for the sale of said goods and merchandise, or of any other goods and merchandise, and denies that the said W. S. Guy was the principal in the transaction. Neither Lamb nor Bunn ever had, to the knowledge and consent of the Gibson Canning Company, anything to do with this corn. That com-

pany, as it supposed, sold the corn to W. S. Guy. In some manner Lamb and Bunn obtained possession of the corn shipped by the Canning Company to W. S. Guy. It is only by assuming that Lamb, by personating W. S. Guy, deceived the canning company and made with it a contract in the name of W. S. Guy, that Lamb and Bunn acquired any title to the property or right to dispose of the same. There is no evidence that Lamb and Bunn, or either, purchased the goods of Guy or were authorized by Guy to sell the corn. The position of Ermeling, that the Canning Company, by bringing this attachment against Guy and garnisheeing Horner & Company and him, Ermeling, is a ratification of the sale by them made to Guy, is, so far as the evidence goes, based upon the theory that Lamb or Bunn, by assuming the name of Guy, succeeded in purchasing and obtaining possession of the corn from the Canning Company.

Ermeling, in his testimony, says that in the sale of said corn he acted as the agent of Lamb and Bunn. It may be, as he states, that instead of making checks payable to their order, he gave them checks payable to currency, because they were strangers here in the city, "only came in occasionally." Yet it would seem that his suspicion as to the transaction would have been aroused by their agreement to pay him ten per cent commission, in a market where, according to the evidence, brokerage runs from two to two and one-half per cent, and where, when accounts are guaranteed, five per cent is the limit.

Ermeling does not testify that he guaranteed the account, although he does say he knew Horner & Company to be good. Deducting ten per cent commission and expenses for freight and delivery from corn sold at fifty-eight and one-half cents, makes the net amount realized by Lamb and Bunn less than fifty-two cents, in a market where, according to the testimony, corn was selling from fifty-eight and one-half to seventy cents; it would seem that Ermeling's suspicions would have been aroused by the expressed anxiety of Lamb and Bunn to get cash at once, and willingness to make a sale upon such terms.

The Circuit Court found the Gibson Canning Company entitled to the sum of $819, paid into court by Horner & Company, being the sum which they promised to pay for the corn delivered to them. Nothing was allowed to Ermeling for disbursements, commissions or advances claimed by him to have been made.

We find no sufficient reason for reversing the decree of the Circuit Court, and it is affirmed.

City of Chicago v. Mary Lamb.

1. EVIDENCE—*As to Merely Possible Future Conditions.*—In a suit for damages as a result of an accident resulting in a hernia, evidence of the danger to one's life from a hernia of that kind is inadmissible, as being too remote and conjectural.

2. DAMAGES—*Must Be Based upon Actual Conditions.*—Damages must be based upon actual conditions, not mere speculation. It is not enough that the injuries received may develop into more serious conditions than those which are visible at the time of the injury, nor even that they are likely to so develop. To entitle a plaintiff to recover present damages for apprehended future consequences there must be such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.

3. WITNESSES—*When Questions Put to Medical Experts Need Not Be Framed Hypothetically.*—Questions put to an expert on direct examination must be framed hypothetically, unless there is no conflict of evidence as to the facts, or the witness is personally acquainted with them.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Reversed and remanded. Opinion filed December 16, 1902. Rehearing denied January 6, 1903.

ANDREW J. RYAN, city attorney, JOHN E. KEHOE, assistant city attorney, for appellant; JAMES J. KELLY, of counsel.

BRANDT & HOFFMANN, attorneys for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

This is an appeal from a judgment recovered by appellee

awarding damages for alleged injuries received from falling on a sidewalk. There is evidence tending to show that she was walking with her husband on the walk in question, when the husband stepped on a loose plank in such a manner as to throw one end of it upward in front of appellee's foot so that she was thrown heavily down; that she suffered a broken rib; that the pleura has adhered to the inner surface of the broken rib, permanently restricting the movement of the lungs and so limiting her power of movement; that the fall caused a miscarriage, and that she was permanently ruptured in the left groin.

It is contended in behalf of appellant that there was error in the admission and exclusion of evidence, and that the award of $3,500 as damages is excessive.

It is not disputed that appellee fell as she says she did. It is urged, however, that her evidence itself tends to show that if ruptured at all by the fall, the rupture was slight and not dangerous; but that by the character of his examination of medical witnesses her attorney was permitted to draw out statements incompetent as evidence, and tending to mislead the jury into the belief that the injury was so serious as to endanger appellee's life.

There is force in this contention. It is not claimed, so far as we are able to discover, that as a matter of fact appellee has any strangulation of the intestine, or that the conditions are such that such a result could reasonably be expected in the future. Yet her attorney conducted the examination of medical witnesses apparently on the theory that the possibility of their occurrence was a proper element of damage. Over objection of appellant's attorneys the medical witnesses proceeded to state that strangulation of the intestine occurs "where the bowels come down and the opening of the hernia closes, and it is nearly impossible to get the bowel back. If the bowel stays there any length of time it becomes gangrenous, that means, in some cases, dead. If a hernia can't be reduced and becomes gangrenous, then it will kill the patient." The ifs in this testimony are significant, but its application to the facts in the

case is by no means apparent. It is true that in reply to a question "whether this hernia is such a hernia as may become strangulated," the witness answered, an objection to this line of examination having been overruled, "Any hernia is liable to become strangulated." The question was put, "What, if anything, is the danger to one's life from that hernia—from a hernia of that kind?" An objection having been overruled the witness answered: "The danger in hernia is strangulation of the intestines." The Court: "What is it in this case?" Answer: "Strangulation of the intestines." The witness then proceeded to describe in detail the manner in which a hernia might become "strangulated," by the intestines coming through the opening becoming constricted, becoming then clogged with fæces until unable to be moved, and that then gangrene would set in; that this would necessitate a surgical operation, and that in such operation "there is risk of infection."

This evidence is clearly incompetent. It substantially amounts to the statement that if all these things happened in regular sequence, the possible result might endanger appellee's life. There is nothing in the evidence to the effect that it was reasonably probable that any of them would happen, or that under ordinary conditions they were even liable to happen. Doubtless it may be true that strangulation of the intestines is a possible danger in cases of hernia. That it is an actual danger in appellee's case, that it is not readily preventable, that it is a probable result of existing conditions, the witnesses do not pretend to say. The proper object of examining them on this point as experts was to have their judgment whether appellee was in fact suffering from strangulation of the intestines or in the ordinary course of events reasonably certain to be as the result of the rupture. Pearson v. Zehr, 31 Ill. App. 199–202. Their testimony was competent as to appellee's present condition, its cause and permanence, not as to merely possible future conditions. O'Brien v. N. Y., N. H. & H. Ry. Co., 13 N. Y. Sup. 305. As is said in C. & N. W. Ry. Co.

v. Town of Cicero, 154 Ill. 656, "The weight and value of the testimony of expert witnesses largely depend upon the foundations of fact and reason upon which their opinions stand." There is danger to a lame man who is not able to move rapidly, if a run-away horse comes along just as he is crossing a street. But in an action to recover from a street railway company for causing the lameness, evidence of such a possible danger and its possibly fatal results would not be tolerated. It is too remote, purely speculative and without doubt incompetent. Many things are remotely possible which never occur, and are never likely to occur. Damages must be based upon actual conditions, not mere speculation.

Testimony of this character has been frequently considered by courts of review. In McReynolds v. B. & O. Ry. Co., 106 Ill. 152–156, it is said with reference to certain testimony: "But injury from the other sources of danger above named would be but merely possible. Such merely possible damages do not form a proper basis for the assessment of the amount of damages; it is only such damages that are reasonably probable." See Jones v. Chicago & Iowa R. R. Co., 68 Ill. 380; see also Conness v. I. I. & I. R. R. Co., 193 Ill. 464–473. Blate v. Third Avenue R. Co., 44 N. Y. Sup. 615, was, like that before us, a case of rupture or hernia, in which a medical witness was allowed to state "what sometimes happens as the consequence of such a condition of things." The opinion quotes from Strohm v. Railroad Co., 96 N. Y. 306, in which it is said: "Future consequences which are reasonably to be expected to follow an injury may be given in evidence for the purpose of enhancing the damages to be awarded. But to entitle such apprehended consequences to be considered by the jury, they must be such as in the ordinary course of nature are certain to ensue. Consequences which are contingent, speculative, or merely possible, are not proper to be considered in ascertaining the damages. It is not enough that the injuries received may develop into more serious conditions than those which are visible at the time of the injury,

nor even that they are likely to so develop. To entitle a plaintiff to recover present damages for apprehended future consequences, there must be such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury." To the same effect are O'Brien v. N. Y., N. H. & H. R. Co., 13 N. Y. Sup. 305 (*supra*); Elsas v. Second Ave. R. Co., 9 N. Y. Sup. 210; Atkins v. Manhattan Ry. Co., 10 N. Y. Sup. 432.

The testimony under consideration tended to give the jury an impression not justified by the facts in evidence, that appellee was in danger of losing her life as a direct consequence of a simple hernia or rupture, as to the existence of which there is contradictory evidence. Appellee testified that her second child was born eleven months after the accident and that she did not commence to wear a truss until three months before that event, or eight months after the accident which is alleged to have been the cause of the rupture. Whatever the facts may be, and what we have said, is not to be construed as expressing any opinion in that respect, as the case must be retried, the evidence complained of was, we think, incompetent, and erroneously admitted.

Objection is made that questions to the medical witnesses should have been put hypothetically. In C. & A. R. R. Co. v. Glenny, 175 Ill. 238–242, it is said, quoting from Bradner on Evidence, p. 537: "Questions put to an expert on direct examination must be framed hypothetically, unless there is no conflict of evidence as to the facts, or the witness is personally acquainted with them." Here appellee's medical witnesses testified that they were acquainted with the facts, and the objection is not well taken.

The objection is urged that the damages are excessive. It is impossible to say to what extent the jury were affected by the prejudicial testimony. Appellant is entitled to have the case retried, and the judgment must be reversed and the cause remanded.

City of Chicago v. Henry Dickman.

1. CROPS—*Measure of Damage for Destruction.*—Where one's crops are destroyed though the negligence of another, he is entitled to recover the value thereof at the time of such destruction. In arriving at this value, there may be taken into consideration the right to have the crops mature undisturbed, and to gather and market them. Evidence as to the probable cost, including that of the use of the land, to bring the crops to the condition in which they were at the time of their destruction, is admissible as tending to show their then value; and evidence also as to what the reasonable probability is as to the maturity of such crops, and the amount of the same that would be matured, is admissible.

Trespass on the Case.—Damage to growing crops caused by filling up a ditch. Appeal from the Superior Court of Cook County; the Hon. JESSE HOLDOM, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Reversed and remanded. Opinion filed December 16, 1902. Rehearing denied January 6, 1903.

CHARLES M. WALKER, corporation counsel, and WILLIAM H. FITZGERALD, assistant corporation counsel, attorneys for appellant.

CARL STROEVER, attorney for appellee; BENJAMIN F. NICHOLSON, of counsel.

MR. PRESIDING JUSTICE WATERMAN delivered the opinion of the court.

This was an action to recover damage alleged to have been occasioned by the negligence of the city of Chicago in filling up a ditch, in consequence of which appellee's land was flooded, and the crops growing thereon destroyed. There was a verdict and judgment for the plaintiff for $3,316. Over the objections of the defendant appellee was permitted to show what the market value of such crops as were growing upon his land in the latter part of June, 1898, would, in a matured state, have been in the following October, November and December. The flood by which appellee's growing crops were destroyed, occurred in the latter part of June. According to his testimony, in the

spring of 1898, he seeded seven acres of Hungarian grass, four and a half acres of cucumbers, two acres of beets, one acre of potatoes, seven to eight acres of cabbage, and had put out about 100,000 cabbage plants. He had also planted four acres of corn.

At the time the flood came, the cabbage plants were above the ground, and the Hungarian grass was up; so also were the cucumbers, the corn and the beets. The cucumbers and the beets were from four to six inches high, and the corn eight to ten inches; the potatoes three to four inches above the ground.

Appellee testified that after the flood in the latter part of June, when the water ran off from the ground, every plant was rotted to the surface of the ground; that they were all lying down, and none grew up again, except a little of the Hungarian grass, "two strips straight through the field about three feet wide." Over objection, he was permitted to state that these two strips of Hungarian grass "showed him afterward what a nice crop of Hungarian grass he would have had if it had grown up." He was also permitted to testify that other crops in that neighborhood, not destroyed by the June flood, matured in good condition.

Appellee testified that at the time of the flood all the work necessary to be done for the maturing of his crops had been performed except a little weeding; otherwise all that was necessary for their maturity was to permit them to grow. He was then permitted to testify what such weeding would have cost him, and what the expense to him of gathering and marketing the crop would have been. Also the time it would have taken to market the crop. He was permitted, over the objection of the defendant, to testify what the fair cash market value of the matured crops would have been in the market in October, November and December of that year, and that from this market value there should be deducted $150 for marketing the crop.

If appellee's crops were destroyed by the negligence of the city, he was entitled to recover the value thereof at the

time of such destruction. In arriving at this value, there could be taken into consideration the right he had to have the crops mature undisturbed by any act of the city, and to gather and market them.

It is quite true, as is urged, that there generally is not what is commonly known as a market value for growing crops. Nevertheless it does not follow that appellee was entitled to receive, not the value of his crops at the time of their destruction, but at a subsequent time, nor that the ordinary rule for the ascertainment of the value of articles is to be departed from in such a case as the present, any more than it follows that because an article has not what is known as a market value, therefore one wrongfully deprived of such article can recover nothing therefor.

The value of articles depends upon the law of supply and demand; that is regulated by the industry, the desires of mankind, and the operation of the forces of nature.

We do not understand that appellee denies that the damage he is entitled to recover is to be determined by an ascertainment of the value of his crops at the time of their destruction. That, he insists, is that such value is to be determined, not by the conditions existing at the time of such destruction, but by that which thereafter happened; not as a result of such destruction, but of causes over which neither he nor appellant had any control, or were in anywise responsible. Evidence as to the reasonable cost, including that of the use of the land, to bring the crops to the condition in which they were at the time of their destruction, was admissible as tending to show their then value; and evidence also as to what the reasonable probability was as to the maturity of such crops, the amount of the same that would be matured, and the probable market value of the same when matured, was admissible, because such evidence would have tended to show what the value of the crops was when destroyed.

As before stated, the reasonable probability as to the maturity of such crops, and the quantity of the same when matured, was admissible. That having been shown, and

the trial having occurred some years after the destruction of the crop, it would not have been proper to have admitted upon the trial, evidence showing that a week or two after the destruction of the crop, all the crops in the neighborhood where these were growing, were destroyed by drought, a simoon, a flood or a tempest, over which neither appellant, appellee nor any other person had any control.

So, too, the market price in October, of matured crops such as, in an immature condition, were upon appellee's land the latter part of June, was not admissible, because such market price in October was produced by a multitude of causes over which neither of the parties to this litigation had any control, or were in any way or wise responsible for, and was a matter concerning which, in June, there could be opinions, but not certainty.

Had appellee, upon the trial, shown what the value of his crops was at the time of their destruction, such value not being determined by the actual state of the market in the following October, but by what, in June, was reasonably probable as to maturity and value that would exist in the following October, appellant would not have been permitted to show that, owing to a great falling off in the demand for such crops, or an abundant supply of such articles, the market price in October was much less than, in June, it was reasonably probable it would be in the following October.

That the rule for ascertaining the value of destroyed crops is as we have stated, we regard as abundantly established in this state by Green v. Williams, 45 Ill. 206; Cilley v. Hawkins, 48 Ill. 308; City v. Huenerbein, 85 Ill. 594; K. & S. R. R. Co. v. Horan, 17 Ill. App. 650; and that it is the rule generally prevailing we regard as shown by Reiger v. Worth Company, 52 L. R. A. 362; Roberts v. Cole, 82 N. C. 292; Sedgwick on Damages, sections 937 and 942.

The citation by appellee from Sutherland on Damages, Vol. 1, page 194, is not sustained by any of the authorities there referred to, except the case of People's Ice Company v. Steamer "Excelsior," 44 Mich. 229. The statement

there made on page 237; that "the owner of the growing crops would not be limited in his recovery to the value thereof at the time of their destruction, nor to the fair rental value of the lands," we do not regard as even claimed by appellee to be the rule; nor can we assent to the further expression of opinion in that case, that if suit were brought and the case tried at once, the rule for ascertaining the damage to which the owner of the crops was entitled, would be variant from the rule to be followed in case the suit was not tried until a very considerable time after the destruction; nor do we think it follows, as is indicated in that case, that to allow evidence of things happening after the destruction of the crop to be shown for the purpose of determining its value, would be less favorable to a wrong-doer than if the evidence were confined to that known and reasonably probable at the time of the destruction.

That which we have said concerning the testimony as to the market value of the crops in October, is applicable to testimony that in the neighborhood in which these crops were, similar crops matured well in the season of 1898. The value of the destroyed crops is not to be determined by that which, after such destruction, actually took place as to other crops growing in the same neighborhood, but by that which was reasonably probable at the time of the destruction of appellee's crops.

The judgment of the Superior Court is reversed and the cause remanded.

B. Ginsburg v. Edward Morrall.

1. PRACTICE—*Where Exceptions Are Not Taken to Action of Trial Court.*—Decisions of the trial court to which no exceptions are taken can not be assigned for error.

2. WITNESSES—*Wife for Husband.*—A wife is not a proper witness for her husband in a replevin suit against him.

3. RES ADJUDICATA—*Replevin.*—One replevin suit after another can not be brought unless there be a failure to secure service in the original suit or other illegal proceeding.

Replevin.—Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Reversed and remanded. Opinion filed December 30, 1902. Rehearing denied January 9, 1903.

HENRY E. NOTHOMB, attorney for appellant; ADOLPH MARKS, of counsel.

FRANK J. HOGAN, attorney for appellee.

MR. JUSTICE BURKE delivered the opinion of the court.

Edward J. Morrall, appellee, bought of B. Ginsburg, appellant, a furniture dealer, certain household goods. He paid some money therefor, and gave his note for the balance of the purchase money.

This note was secured by giving a chattel mortgage of said goods, signed in the name of "Edward Morril" and "Edward Morill," properly acknowledged in the name of "Edward Moril," and filed for record in the the recorder's office of Cook county. The mortgage provided that upon default in any or either of said payments that Morrall should deliver up the goods to Ginsburg.

During the period of two years immediately after the giving of this mortgage Morrall paid less than $30 thereon; Ginsburg states, that not only did Morrall not pay as he had agreed, but threatened the collector with violence, and thereupon Ginsburg instituted a replevin suit before Jarvis Blume, a justice of the peace, and with a writ issued therein obtained possession of the goods on or about the 25th day of May, 1900. After hearing the evidence, judgment was rendered by the court in favor of Ginsburg, appellant, and against appellee, for the right of possession of the property taken on the writ, one cent damages and costs of suit. Soon thereafter, Morrall, appellee, went many miles out into the country to the office of John R. McDonald, a justice of the peace, and before him began a replevin suit to obtain possession of the same goods, the right to the possession of which had been determined in the above mentioned replevin suit, and judgment was obtained before

McDonald for $90. Appeal was taken to the Superior Court and there judgment rendered for the plaintiff, in the sum of $50, and by appeal the case is brought to this court.

As this statement discloses, this is a suit in replevin, and reversal of the judgment entered therein by the Superior Court is sought on three grounds: First, because the court erred in overruling motion for new trial; second, because the court admitted and refused to strike out improper evidence; third, because the court erred in failing to instruct the jury to find the issues for the defendant.

After verdict of the jury, a motion for new trial was made and overruled. No exception to the order overruling the motion was preserved. The bill of exceptions contains all the evidence in the case and may be wholly insufficient to warrant the finding of the jury. However, as no exception was taken to the decision of the court overruling the motion for a new trial at the time it was announced, that decision can not be assigned for error. Pottle v. McWhorter, 13 Ill. 454; Trigger v. Drainage District, 193 Ill. 231.

The testimony of plaintiff's wife was wholly incompetent. Poppers v. Wagner, 33 Ill. App. 113; Wolff v. Van Housen, 55 Ill. App. 295; Craig v. Miller, 133 Ill. 300.

However, no advantage can be had of that error, unless exception thereto was taken with reasonable promptness. She was called to the witness stand and before she had stated whether she sustained any relation to the plaintiff she proceeded to give important testimony, and further said: "I never signed any papers; neither did my husband. That is not my husband's writing on those papers. I swear to God he never signed that chattel mortgage. We did get goods from Mr. Ginsburg, but we paid for them afterwards. We never signed any mortgage."

Counsel for appellant then moved to strike out her testimony upon the ground that she was the wife of the plaintiff and incompetent to testify. The motion was overruled and to this ruling of the court the defendant then and there

duly excepted. Objection to Mrs. Morrall as an incompetent witness ought to have been made at the earliest moment possible, but from her testimony it could not have been known that she was the plaintiff's wife before the motion to strike out her testimony was made. In fact the attorney for appellee even suggests that the evidence does not show that she was the wife of the plaintiff. However, in view of her language, we have no doubt that she was the wife of the plaintiff and that the motion of appellant to strike out her testimony ought to have been sustained. Her language was very forcible and undoubtedly made a profound impression on the jury. The chattel mortgage, as the case was tried, was a controlling element, and she states, "I swear to God my husband never signed that chattel mortgage." If the jury believed her words, we can account for their verdict; but attorney for appellee suggests that since exception to the order overruling the motion for a new trial was not preserved, we are prevented from considering the prejudicial error of refusing to exclude the wife's testimony and he holds up as a bar the case of Pottle v. McWhorter, *supra*. That case was very similar to the one at bar. There, no exception was preserved to an order overruling motion for a new trial, but the record shows that portions of the evidence offered by the defendant to support the issues on his part were objected to by the plaintiff, the objections overruled and exceptions taken in proper time to the decisions of the court admitting same. The court there say: "Some of the evidence admitted was clearly improper and did not tend to prove either of the issues in the case; and it is impossible to account for the findings of the jury, except upon the supposition that they were influenced by this incompetent testimony." And the court concludes its opinion with the statement that the plaintiff's objection to the testimony offered to prove such a state of facts was therefore improperly overruled and therefore they reversed the judgment.

So, in the case at bar, at the earliest moment possible, and so soon as the attorney for the appellant could know

that Mrs. Morrall was the wife of plaintiff, he moved the court to strike out her testimony. His motion was overruled and exception then and there taken. Her testimony was clearly improper and doubtless influenced the jury, at least we can not say that it did not influence the jury. She corroborated her husband as to the signature to the chattel mortgage, and without her testimony, the uncorroborated statement of the plaintiff was denied by the testimony of several witnesses for the defendant. The case of Pottle v. McWhorter does not seem to have been reversed or modified, and we shall therefore hold the refusal of the court to sustain the motion to strike out the testimony of the defendant's wife was prejudicial error and sufficient to cause the reversal of this judgment. Upon another trial it can be shown whether or not the second replevin suit was properly brought in the country as aforesaid soon after the first judgment was entered in the first replevin suit. Apparently, both suits were between the same parties and the same property was the subject-matter of each replevin suit, and if there are no other circumstances, disclosed by the evidence, to warrant the second suit, then an instruction should be given to the jury to find the issues for the defendant. One replevin suit after another can not be brought unless there be a failure to secure service in the original suit or other illegal proceeding. There must be an end of litigation before the offices of every justice of the peace in the county have been visited.

Judgment reversed and cause remanded.

Franklin Osburn v. City of Chicago.

1. CITIES AND VILLAGES—*Right under Police Power to Require Railroads to Elevate Tracks.*—A municipality has the right in the legal exercise of its police power, within reasonable limits, to require a railroad company to elevate its tracks so as to avoid grade crossings over public streets, and thus protect the lives and property of its citizens.

2. EASEMENTS—*Of Public in Railroad Right of Way.*—A right of

way belonging to a railroad company is private property as to an adjoining owner and the latter has no easement thereon of light, air and view.

8. RAILROADS—*Liability of Owner of Property Devoted to Public Uses.*—The liability of the owner of property devoted to public uses is no greater than that of the owner of property held for private uses.

Trespass on the Case.—Damages caused by the elevation of railroad tracks. Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Affirmed. Opinion filed December 30, 1902.

Statement.—Appellant sued to recover damages alleged to have been caused by elevation of the tracks of the Chicago and North Western Railway Company under an ordinance enacted by the city council of Chicago. In his declaration he alleges that he is the owner of certain blocks of land embraced within the city limits, containing about 125 acres, having a width of about half a mile from east to west; that prior to the elevation of the tracks, it was possible for persons and vehicles to pass over the railroad right of way which runs diagonally across the property, at or near the level of the ground; that without his knowledge or consent, and without compensation to him, the city, by said ordinance, caused the tracks to be elevated upon an embankment thirteen feet high, eighty feet wide at the bottom and forty at the top; and that by reason of such elevation access and egress to appellant's premises was closed, and light, air and vision were obstructed, thus greatly injuring the property and damaging appellant.

There is evidence tending to show that the embankment extends about half a mile through the property without any viaduct, subway or crossing within that distance, over or under the tracks; that the premises said to be damaged had been prior to the elevation platted into blocks, and three north and south streets laid out, which were intended to run across said railroad tracks and right of way; that these proposed streets are now completely closed, and that appellant's property has been damaged.

At the close of the plaintiff's evidence, the court instructed the jury to find for the defendant.

N. M. JONES, attorney for appellant.

CHARLES M. WALKER, corporation counsel, and THOMAS J. SUTHERLAND, attorneys for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

Appellant's counsel relies for the recovery sought, upon the constitutional provision, that private property shall not be taken or damaged for public use, without just compensation. It is to be borne in mind that the damage which it is alleged appellant has suffered is charged in his declaration to have been caused solely by the elevation of the tracks of the railroad company on its own right of way. There is here no claim for damages by reason of closing or changing the grade of existing streets or occupying them with railroad tracks. No direct physical disturbance is alleged of any right of property possessed by appellant, differing in kind or degree from that of the public in general. The plat of appellant's property introduced in evidence shows that the streets laid out thereon do not cross or include any part of the railroad right of way, but stop at its outer borders. No streets were ever opened across the tracks and none were closed by the erection of the embankment. Appellant has not been thereby deprived of any right of access or egress which he ever possessed. Damages for the loss of what appellant never possessed can scarcely be deemed recoverable. It is possible that the difficulties in the way of opening the streets referred to across the right of way may be greater now than before the elevation, but this would afford no cause of action. The street might never have been opened had there been no elevation. The cases cited by appellant, in which changes of the grade of streets, the building of viaducts, the construction of railroads upon public streets, thereby injuring private property, have been deemed a taking of private property for public use, so as to entitle the owner to recover special damages therefor, are not in point.

That the municipality had the right, in the legal exercise of its police power, within reasonable limits, to require the

railroad company to elevate its tracks so as to avoid grade crossings over public streets, and thus protect the lives and property of its citizens, is not now open to question. City of Chicago v. Jackson, 196 Ill. 496–502. It is true that rights of property can not be invaded under the guise of an exercise of the police power. But requiring the railroad to elevate its tracks on its own right of way, invaded no right of property for which appellant is entitled to recover compensation. Recovery can not be had of the railroad company for damages caused by the alleged obstruction of light, air and view occasioned by such track elevation. A right of way belonging to a railroad company is private property as to an adjoining owner and the latter has no easement thereon of light, air and view. Kotz v. I. C. R. R. Co., 188 Ill. 578–583; C. & W. R. R. Co. v. Cogswell, 44 Ill. App. 388. There was here, as we have said, no direct physical disturbance of any public or private right which the plaintiff enjoys in connection with his property which entitles him to special damage in excess of that sustained by the public generally. See City of Chicago v. Spoor, 190 Ill. 340–347, and cases there cited. The railroad had the right to elevate its tracks, independent of the ordinance without liability for so doing. The city incurred no liability by requiring the road to do for the public safety, what the railroad company had a right to do of its own volition, upon its own property, without incurring liability. The liability of the owner of property devoted to public uses is under such circumstances no greater than that of the owner of property held for private purposes. C. & W. I. R. R. Co. v. Cogswell, and Kotz v. Ill. Cent. Ry. Co., *supra*; Metropolitan W. S. El. R. R. Co. v. Goll, 100 Ill. App. 323–334, *et seq.*

The judgment of the Superior Court is affirmed.

George Middendorf et al. v. August Schulze.

1. MASTER AND SERVANT—*Servant Assumes the Ordinary Hazards of the Employment.*—A servant assumes the ordinary hazards of the employment in which he is engaged.

2. NEGLIGENCE—*By Reason of Which Damage Can Be Recovered.*—The only negligence for which an injured party can recover damage is that which was the proximate cause of the hurt.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Reversed and remanded. Opinion filed December 30, 1902.

THORNTON & CHANCELLOR, attorneys for appellants.

CHARLES S. HARMON and GEORGE E. DAWSON, attorneys for appellee.

MR. PRESIDING JUSTICE WATERMAN delivered the opinion of the court.

This was an action to recover damages for personal injuries said to have been sustained by reason of the negligence of appellants. The plaintiff's declaration, after stating that he was in the service of the defendants and that it was their duty to do certain things, proceeds:

"Yet defendants, not regarding their duty in that behalf, so negligently and improperly failed to provide said elevator with such guards, appliances, checks and other equipments, for securing the entire and safe control of said elevator to the person using same during such use, and so carelessly and negligently failed to take all proper and necessary precautions for securing the safety and security of whomsoever might at any time be using said elevator, that while plaintiff, with all due care, was in the act of unloading from said elevator to the third floor of said building, a hand truck, loaded with egg cases, said elevator was then and there, without any sufficient previous warning, set in motion by or through the agency of some person or persons to the plaintiff unknown, and while the plaintiff was unable to prevent same, was lowered in such manner that said truck was thereby pressed with great force and violence

against plaintiff's side and body, and said elevator still descending, said load of egg cases was precipitated upon and over plaintiff, by reason whereof and of the pressure of said truck handle plaintiff was grievously wounded."

The second count of the plaintiff's declaration says that there was, prior to his injury, in the city of Chicago the following ordinance:

"438. Elevator Shafts and Enclosures.—All elevator shafts and elevator enclosures of every kind shall have iron doors which shall be made to open from the inside only, excepting only the door upon the ground floor of the building, which shall also have a lock to permit opening the same from the outside."

And it was the duty of the defendants to comply therewith; and then proceeds:

"Yet the defendants, not regarding their duty in that behalf, so negligently and improperly failed to provide the elevator shaft or enclosure of said last mentioned elevator with iron doors so made, and so failed to provide said shaft or enclosure with any doors whatsoever, that while the plaintiff was in the act of unloading from said elevator a hand truck, said elevator was then and there, without any previous warning thereof, set in motion by or through the agency of some person or persons to the plaintiff unknown, and while plaintiff was unable to prevent same, was lowered in such manner that said truck was thereby pressed with great force and violence against plaintiff's side and body, and said elevator still descending, said load of egg cases was precipitated upon and over plaintiff," etc.

Plaintiff testified that he was in the elevator and up to the third floor; that he stopped the elevator and was going to shove the truck off "the way we always do, and somebody shook the rope and I hollered and said, 'Wait, there is a load on.' I had the handle and was shoving it off, and down goes the elevator, and the handle caught me pretty near up against the wall so I hollered, and the truck went over on top of me, egg cases and all. I hollered and somebody stopped the elevator."

According to each count of the declaration, the accident to appellee was caused by the elevator being set in motion by or through the agency of some person or persons to the

plaintiff unknown. The evidence as to the cause of the accident sustains the charge in the declaration, save that the only testimony that any person started the elevator is that of the plaintiff, that somebody shook the rope; otherwise, no one testifies that anybody shook the rope or took hold of it, or did anything to start the elevator. The plaintiff's testimony that somebody shook the rope is based upon his seeing a movement of the rope in the elevator cage; therefrom he infers that the rope was shaken; that the defendants, or either of them, or any person in their employ, or by their direction, or to their knowledge or notice, either started the elevator or shook the rope, was not shown; neither is it charged in the declaration. It is not charged in the declaration nor shown by the evidence that, considering the use to which this freight elevator was put, it was practical to arrange the operation of the same so that the sole control thereof should be in the person "using the same, during such use," or that there was any law or ordinance requiring that the elevator should be so equipped; while it does appear that appellee well knew the elevator could be moved by persons using the same, that is, by persons not in the elevator cage; therefore, a movement of such elevator by some one outside of it while he was in the same, was a risk which he assumed. A servant assumes the ordinary hazards of the employment in which he is engaged. C., B. & Q. Ry. Co. v. Abend, 7 Ill. App. 130; Page v. Naughton, 63 App. Div. 377; Tobin v. Friedman Mfg. Co., 67 Ill. App. 149.

It does appear that appellants had not complied with the ordinance of the city heretofore mentioned, but it is not shown that such non-compliance was the cause of the injury.

The only negligence for which an injured party can recover damage is that which was the proximate cause of the hurt. It was not upon the trial made to appear that had the elevator shafts and enclosure been equipped with doors, such as are required by the ordinance, the elevator would have been so constructed that it could not be moved

from the outside. The ordinance does not require that elevators shall be so constructed that the entire and sole control of the same shall be secured to the person using the same, during the use thereof. The difficulty with the claim made by appellee, under the ordinance introduced in evidence, is not that a failure to comply with the same was not negligence, but that it does not appear that such negligence was the proximate cause of the injury he received.

The judgment of the Circuit Court is reversed and the cause remanded.

Bank of Commerce v. George S. Miller.

105 224
d202s 410

1. BANKS AND BANKING—*Custom Will Not Excuse a Collecting Bank from Exercising All Reasonable Diligence.*—No general custom will excuse a collecting bank from exercising all reasonable diligence in collecting a check, and a special usage will have no greater effect in excusing the bank, than will a general custom.

2. SAME—*Particular Custom of Bank Must Be Known to Customer to Be Binding upon Him.*—A particular custom, in order to be binding on a customer sending a draft for collection, under the circumstances of this case, must have been actually known to him when he sent it.

3. RATIFICATION—*Made Only upon Full Knowledge of the Material Facts.*—Ratification is not made save with full knowledge of all material facts; the ratification of the principal in ignorance of them is no defense to the agent.

4. USAGE—*How it Must Be Established.*—Usage is a fact, and if it is a particular usage, it must be known to the parties, and if a general usage, it must be so well established and known, that it must be considered that parties reasonably well acquainted with the business either knew it or ought to have known it.

Trespass on the Case.—Damages for negligence of bank in collecting a draft. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Affirmed. Opinion filed December 30, 1902.

Appellee, in 1895, resided at Monee, Illinois, about thirty-four miles from Chicago, where he conducted for some years prior thereto, a general store and grain elevator business. During all this time he had been doing business with Tim-

berlake & Company, and their predecessors, commission merchants, with offices at 501 Royal Insurance Building, in Chicago, selling them corn. During this period he was a depositor with the appellant, Bank of Commerce.

It was the custom of the appellee from time to time to draw sight drafts upon Timberlake & Company, and send them with other items to the Bank of Commerce for deposit and collection. He had no bank deposit or pass-book and it does not appear that he knew the rules and method employed by the bank for the collection of the items which he forwarded.

On Wednesday, July 3, 1895, Timberlake & Company were indebted to appellee in the sum of $1,800 and upwards, and in the evening of that day he made out a deposit statement, including a number of small checks and a sight draft for $1,000 upon Timberlake & Company, signed by him and made payable to the order of the Bank of Commerce. July 4, 1895, was a holiday, and on the morning of July 5th, he mailed the letter inclosing the items for deposit with the draft. The draft was received by the bank at 2:30 P. M. on Friday, the fifth day of July, 1895. It was immediately entered for collection, and a postal card dated July 5, 1895, was made out stating that the bank had received and credited the $1,000 draft, but was not mailed to appellee until the evening of Saturday the sixth and was received Monday, July 8th.

The bank presented the draft to Timberlake & Company by messenger, about eleven o'clock of Saturday, July 6, 1895, and their check for $1,000 on the National Bank of the Republic, payable to the order of the Bank of Commerce, was received and the draft was stamped "Bank of Commerce, paid," and delivered to Timberlake & Company. It was about two blocks from the Bank of Commerce to the office of Timberlake & Company and about one-half block from the Bank of Commerce to the National Bank of the Republic.

The Bank of Commerce did not present this check for payment or certification to the National Bank of the Republic

on Saturday, and on Monday the eighth, presented it for collection through the clearing house, and it reached the National Bank of the Republic between eleven and twelve o'clock on Monday, July 8th, (along with other checks which in the aggregate exceeded the entire amount to the credit of Timberlake & Company), and payment was refused.

The account of Timberlake & Company was good for the amount of the check on Saturday, and the check would have been certified and paid if presented when the bank opened on July 8th, but about eleven o'clock the National Bank of the Republic credited the entire balance of the Timberlake & Company account upon demand notes which it held, and refused to pay further checks, and at noon on Monday, Timberlake & Company failed, and have since remained insolvent.

On the afternoon of Monday, July 8th, the bank wired appellee "Timberlake draft not good." This telegram was received late in the afternoon, and next morning appellee came to Chicago on an early train, was introduced to the attorneys of the bank and with their assistance started an attachment suit against Timberlake & Company for the entire amount of his claim, including $1,000.

On his return home on the evening of Tuesday, July 9th, after starting the attachment suit, he was advised by letter and telegram which he found awaiting him, that the bank, appellant, had received a check and that it presented the check at the office of Timberlake & Company immediately after the refusal to pay by the National Bank of the Republic, and that the cashier of Timberlake & Company stated that Timberlake had gone home sick and that the matter would be all right in the morning, and that it would present the check at the bank again on the morning of the next day (Wednesday).

July 11, 1895, the appellee sent to appellant the following letter:

"MONEE, ILL., July 11, 1895.

BANK OF COMMERCE, CHICAGO, ILLINOIS.

GENTLEMEN: Letters and messages received. On 7-6-'95

I received acknowledgment that Timberlake draft was paid and placed to my credit. I will hold you responsible for said amount. I remain,

Yours truly,
GEORGE S. MILLER."

On the 13th day of July, 1895, appellee received through the mail from appellant the said Timberlake check, but returned it to appellant, writing the following:

"It is useless for you to attempt to foist this check of W. M. Timberlake & Co. upon me. I do not own it and I will not have it, and will return it to you every time you send it to me. I remain."

Appellee made demand upon appellant about July 15, 1895, for payment of said amount of $1,000 and payment was refused.

FELSENTHAL & FOREMAN, attorneys for appellant.

FRANK F. REED, attorney for appellee.

MR. JUSTICE BURKE delivered the opinion of the court.

The draft involved in this case was received from George S. Miller, appellee, of Monee, Illinois, by the Bank of Commerce of Chicago, appellant, through the mail at 2:30 o'clock in the afternoon of Friday, July the fifth, 1895. It was made payable to appellant, signed by appellee, and drawn on Timberlake & Company, a commission firm of Chicago. The bank did not present the draft to the drawee until the next day at about eleven o'clock and then received therefor an uncertified check drawn upon the National Bank of the Republic to the order of the bank and signed by Timberlake & Company.

The Bank of Commerce took no steps to collect or have certified, the check on Saturday, but on Monday presented it for collection at the clearing house, and it reached the National Bank of the Republic between eleven and twelve o'clock on Monday, July 8th, where and when payment was refused. The account of Timberlake & Company was good for the amount of check at National Bank of the Republic, during Saturday, and at ten o'clock, and for some time there-

after, on Monday, July 8th, but about eleven o'clock the National Bank of the Republic appropriated the entire balance of Timberlake & Company to pay certain demand notes, and one hour thereafter Timberlake & Company failed, and have since then remained insolvent.

Appellee recovered judgment in the Circuit Court for the amount of the draft. Appellant bases its request for a reversal of this judgment upon five grounds, first, that it was not guilty of negligence in not presenting for payment the draft on the day of its receipt.

The declaration does not count upon this fact as an act of negligence, but sets up as the cause of loss only the following:

"The defendant, appellant, wholly failed to present said check for payment or certification until long after the hour of 12:30 P. M. on the said 8th day of July, A. D. 1895, until the hour of 2 o'clock P. M. on said day, when the said National Bank of the Republic refused to honor and pay said check, wherefore by reason of the taking of the said check by the said Bank of Commerce instead of legal tender or money payable to said draft and by reason of the failure of the said Bank of Commerce to present the same to the National Bank of the Republic on the said 6th day of July, A. D. 1895, and prior to the hour of 12:30 P. M. on the 8th day of July, 1895, and for no other reason, the actual payment of said draft failed."

The jury was waived and case submitted to court. Certain propositions of law were presented to the court and among others the following, which the court refused to hold:

(10.) "The court is requested to hold as the law in this case that if it was the custom of the defendant bank not to present for payment paper sent to it for collection and received by it in the afternoon of any day, until the morning of the next day, it can not be charged with negligence for presenting such paper so received, on the next day after its receipt."

It will not be presumed that the court found the appellant guilty of any act of negligence not charged in the declaration; and even though in a proper case the instruction might be held correct, however under the pleadings

and evidence in this case, we do not consider it reversible error to have refused to mark said instruction "Held."

Negligence does not depend alone upon a custom, whether proved or unproved, of the bank; and without taking into consideration other questions, such as the relation of the parties, knowledge of the custom, etc., the record does not disclose that the court made, and we are satisfied that the court did not make his findings upon the theory suggested by this objection; because the court, in propositions of law presented by appellant, numbered 1, 2, 3 and 5, held, very favorably for appellee, and as law, the substance of proposition number 10.

Second. The second and third grounds of appellant will be considered together and they are: Appellant did not act improperly in taking a check for the draft instead of money, and appellant exercised due diligence in presenting the check for payment through the clearing house. The draft was presented to Timberlake & Company on the forenoon of Saturday and an uncertified check of Timberlake & Company taken therefor, and no attempt made to collect or have the same certified, except by presenting the check for collection through the clearing house on Monday. Appellant attempted to show that it acted in accordance with the general custom of banks, but if not, at least in accordance with its own particular custom.

Appellant most signally failed in its contention that in failing to present the check in question for collection or certification on Saturday, it acted in accordance with the general custom of banks. To sustain appellant's contention in this regard, A. H. Mauerman and Miller testified, the one that the only knowledge on the subject he had was from hearsay, and Miller testified that it was the custom of appellant to hold checks received for collection by late mail until next day, but that he was not familiar with the custom of outside banks. On the other hand, to prove that it was contrary to the general custom of banks in Chicago to accept a check in payment for a draft received from an outside depositor and hold the same without at once collect-

ing or having it certified until the Monday following, the officers of several of the largest banks of Chicago testified as follows: John A. Moulton, vice-president of the Corn Exchange National Bank of Chicago, in answer to a question as to whether it was the general custom of the Chicago banks to accept checks uncertified, as was done in this case, stated that it was not the custom, but was the general custom to collect the money or its equivalent, and that "if we failed to do it, if we take anything but the money, we do it at our own risk."

It may be, as the counsel suggests, that the latter part of this statement is a conclusion of the banker, but if it is a conclusion, it only makes more certain his understanding and statement of the custom of the banks, including the Corn Exchange Bank.

P. K. Gordon, of the First National Bank of Chicago, testified that he was familiar with the customs and usages in 1895, with reference to the collection of drafts in the city of Chicago, and that in 1895 it was not the general custom on the part of banks to take uncertified checks in payment for drafts and surrender and mark them paid, but he states that the First National Bank would, in a case of certain board of trade houses, take the checks, have them returned to the bank to some one empowered to look them over, and such officer would immediately upon looking them over send out for certification those the bank did not wish to take chances on.

Chas. C. Reed testified that in 1895 it was the custom among banks, naming the Illinois Trust and Savings Bank, the Commercial Loan and Trust Company Bank, the Royal Trust Company, the Merchants National Bank, and the Union National Bank, that when drafts were to be collected it was customary to instruct messengers to get the checks that they received in payment of $500 and upward, certified before they returned to the bank, and after they returned to the bank an officer was authorized to look over the checks for the small amounts under $500 and determine whether the bank would take the risk, and if any special

checks were found upon which they were not willing to take the risk, they were sent out at once for certification. These witnesses, of large, long and varied experience in the banking business in Chicago, have satisfied us, as they evidently satisfied the careful and experienced judge who tried the case, that the appellant, in holding the check uncertified, did not act in accordance with the general custom of Chicago banks which prevailed in 1895. But appellant insists that even though it failed to act pursuant to the custom of Chicago banks in collecting the check in question, still the general rule followed by bankers in collecting for drafts can not be invoked in this case, because it was the usage of appellant to present checks taken under the circumstances in evidence, through the clearing house. Appellant insists that if it was the custom of the appellant bank not to present a check, taken in payment of a draft, directly to the bank upon which it is drawn, but through the clearing house, then surely appellee was bound by such usage and appellant ought not to be charged with negligence. The evidence shows that appellee lived in the country and sent, for collection and deposit, items from his country store and at no time had a deposit book of appellant, and was not aware of the alleged particular custom of appellant in collecting drafts; yet attorney for appellant insists that appellee is conclusively presumed to have known this alleged particular custom of appellant, and refers to Morse on Banks and Banking, and Bolles on Bank Collections; Mills v. The Bank of the United States, 11 Wheaton, 431; Fowler v. Brantley, 14 Peters, 318; Moors v. Goddard, 147 Mass. 287.

Without extending this opinion with a review *in extenso* of the authorities above referred to, we are of opinion that the attorney for appellant has comprehensively, tersely and accurately abstracted these authorities to a complete refutation of his position, when he says: "It is true the foregoing cases and authorities hold that such presentation of a check through a clearing house can not be held to be negligence, if the evidence shows that that was the general custom of

banks." And attorneys further maintain that this doctrine by parity of reasoning also extends to a case wherein the evidence shows that such was the custom of the particular bank entrusted with the collection of a draft. Mr. Mauerman states that the custom of the Bank of Commerce in regard to these collections was that "We would accept the check as cash provided the firm was good and reliable," and thereupon the court very pertinently asks, "Who was to pass on the solvency of the firm? who was to determine that—the bank?" And witness replied, "The bank did."

The witness further stated:

"Not always, but generally, where there was a plain draft we accepted the check. When we received the sight drafts for collection at the Bank of Commerce in 1895, we always sent them for presentation by messenger. If the messenger did not find the firm in he would leave a notice to the payee of the draft. When Timberlake & Company were out and the boy left a notice, then Timberlake & Company in the afternoon would come around with their certified check and take up the draft."

The notice left by the messenger stated that the checks must be certified, so that it is by no means certain that the appellant had a particular custom of its own in regard to collecting drafts irrespective of the amounts for which they were drawn, and if it did have such particular custom, two things are certain—that such alleged particular custom was not in accordance with the general custom that obtained in 1895, among bankers, and if such particular custom existed, it was entirely unknown to the appellee. Counsel have quoted at length much law as to whether the appellant was at fault in surrendering the draft in question, but as has already been shown, no negligence in this regard is charged, therefore the opinion quoted at length in the trial before Lord Kenyon has no bearing upon this case. It may be observed in that case that the court stated that "We dare not grant a rule, as it would be putting the whole trade of London in suspense." In that case there was a general universally recognized usage and custom.

In Burkhalter v. The Second National Bank, 42 N. Y. 538, it was held that the plaintiffs were bound to demand payment on the first day they received the draft, or the next day, and that they were bound to use reasonable diligence in demanding payment; but in that case it appears that Culver, Penn & Co., who took up the draft and charged it to the drawer, had no funds in the bank upon which they drew their check in payment thereof. On the day plaintiffs received the draft, or the next day, although the bank continued to pay their checks on the day the draft was received, with the expectation that they would make their account good, and laboring under this impression, a second draft was given in payment for the first draft. Defense to payment of this second draft was made on the ground that it was given under a mistake of facts, for the first one, from which it had been discharged. This case was decided by a divided court with a statement that no critical examination of other cases had been made and that the decision would be based on Turner v. Bank, 3 Keyes, 425.

In Smith v. Miller, 43 N. Y. 171, the very significant language is used:

"When a check is taken instead of money, as was done by the plaintiffs, a delay of presentment for a day, or for any time beyond that in which with proper and reasonable diligence it can be presented, is at the peril of the party thus retaining the check and thus postponing presentment, as between him and the persons in interest whom he represents. If a custom can exist in law, and does exist in fact, authorizing such delay at the risk of the absent principal, it must be shown; it can not he presumed to exist without evidence. It was the duty of the defendants to present the check at the bank at least during the day."

In the case of Indig. v. The National City Bank, 80 N. Y. 100, was a holding by nearly an evenly divided court, with reference to a question of agency, where a note was sent by mail to a distant bank, and does not aid in deciding the case at bar. The conclusion to be drawn from these cases and the text books cited by counsel is, that a draft

may be surrendered and a check taken therefor, but all reasonable diligence must be used in presenting such check for collection, and if such diligence be used and the check is not promptly paid or certified, then that the draft may be at once reclaimed. No general custom, if such custom existed, would excuse the collecting bank from exercising all reasonable diligence in collecting such check, and certainly a special usage would have no greater effect in excusing the bank, than would a general custom. National Bank of Commerce v. The Am. Ex. Bank, 151 Mo. 320; Minneapolis v. Metropolitan Bank, 76 Minn. 136; Marine Bank v. Chandler, 27 Ill. 525; Webster v. Granger, 78 Ill. 230.

The alleged particular custom and method of the Bank of Commerce in relation to the presentation of drafts, receipt of checks therefor and retention of same until the following day, contrary to the general custom, was a particular or special custom, and in order to be binding on appellee, under the circumstances of this case, must have been actually known to him when he sent the draft for collection. 27th Am. & Eng. Ency. of Law, article, Usages and Customs and Notes; Strong v. King, 35 Ill. 9; National Bank v. Burkhardt, 100 U. S. 686; Corrigan v. Herrin, 44 Ill. App. 363; Rickerson v. Hartford Ins. Co., 149 N. Y. 307.

In Burnham v. Boston Marine Ins. Co., 139 Mass. 399, it was said:

"Usage is a fact; and if it is a particular usage, it must be known to the parties; and if a general usage, it must be so well established and known, that it must be considered that parties reasonably well acquainted with the business, either knew it or ought to have known it. A usage must not be unreasonable. 1st Blackstone, 77."

In Whitney v. Esson, 99 Mass. 308, 96 Am. Dec. 762, the Supreme Court said:

"The decision of Russell v. Hankey, 6 T. R. 12, was based upon the ordinary usage in London. But in Byles on Bills, (5 Am. Ed.) 24, it is said not to be usual at this day with London bankers, to exchange bills for checks,

and it is doubtful if the bank would now be protected in so doing. In this case it is agreed by the parties that it is a common practice for holders of drafts to accept the check of the drawee in exchange for the draft, though it is not claimed to be a general established usage, and in most cases the standing of the drawers of checks is such that these checks are taken as readily as cash. This may make a common practice among men who are dealing on their own account, but such practice falls short of a usage applying to the collection of drafts for absent parties."

Appellee, in case at bar, was an absent drawer of the draft and unacquainted with the alleged method of doing business in regard to collection of drafts by appellant. It is suggested that appellee lost nothing because of the conduct of appellant in failing promptly to collect the draft or check, but we decline to enter upon the sea of speculation with reference thereto. The record is silent, and we must therefore presume that the drawer of the draft intended its collection with all reasonable and ordinary speed. If the bank has failed so to do, the loss must fall upon the negligent. Appellant claims that even if it was guilty of disobedience of orders, express or implied, still he, appellee, ratified the bank's conduct in regard to the presentation of the draft and check. Appellee did institute a suit against Timberlake & Company as soon as possible, for his claim, including the amount of the draft, with the assistance of the bank, the president thereof signing the bond for attachment proceedings, but at that time appellee did not know of the conduct of the bank in reference to presenting the draft, or that the bank had accepted an uncertified check. So soon as appellee learned of the conduct of the bank with respect to the draft and check, he promptly notified the bank that he would hold it liable for the amount of the draft, and he thereafter discontinued his said suit as to the amount of said draft. The record does not disclose any act of negligence on the part of appellee from which the bank could have suffered. It appears that the said attachment suit was begun by appellee without a knowledge of the facts pertaining to the draft and check, which the bank ought to have communicated to him.

Ratification is not made save with full knowledge of all material facts, and if the agent keeps back or suppresses any such facts, the ratification of the principal in ignorance of them is no defense to the agent. Mechem on Agency, 173, and authorities there cited.

Finally, attorney for appellant pleads that if the bank was chargeable with negligence, nominal damages only should be assessed. It must be conceded that if the bank was negligent, as charged in the declaration, the evidence shows that the full amount of the draft could have been collected on Friday and Saturday and at the opening of the National Bank of the Republic on Monday. We therefore can not say that the amount of the judgment is too large.

The judgment of the Circuit Court is affirmed.

Union Book Company v. Michael Robinson.

1. PRACTICE—*Objections Waived When Not Made in the Trial Court.*—It is too late to raise in this court an objection to an informality which, had attention been called to it at the time, would doubtless have been at once remedied. By not making the objection in the trial court, it is deemed to have been waived.

2. SAME—*Court is Presumed to Have Complied with Its Own Rules.*—In the absence of any showing to the contrary the presumption is that the court, at the time of the trial, complied with its rules in respect to calling the short cause calendar.

Assumpsit.—Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANECY, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Affirmed. Opinion filed December 30, 1902.

WESTOVER & CARR, attorneys for appellant.

P. J. O'KEEFFE, attorney for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

This is a suit originally brought before a justice of the peace, from whose judgment an appeal was taken by appel-

lant to the Circuit Court. Shortly thereafter, upon a preliminary call in said court of 100 cases, made to ascertain which of that number were ready for trial, no one appearing when this case was called, the court ordered it stricken from the docket.

It is first urged that the subsequent proceedings were erroneous for want of a formal order of re-instatement on the docket. It does not appear that any formal motion to re-instate was made; but seven days after the cause had been stricken off, appellee's attorney served notice on appellant that he would ask leave of court to file in the cause the transcript of the judgment of the justice of the peace. When this application was made, the court stated that leave was not necessary and the transcript could be filed as a matter of course. This was done accordingly. We regard these proceedings as re-instating the cause. It is probable that on the said preliminary trial call the intention of the court was not to strike the cause from the docket but from the trial calendar. However that may be it is too late now to raise in this court an objection to an informality which, had attention been called to it at the time, would doubtless have been at once remedied. The objection must be deemed to have been waived.

It is urged that the court erred in placing the cause on the short cause calendar. If this objection were well taken, which the abstract fails to show, it has been waived. No application to strike the cause off appears ever to have been made. See Treftz v. Stahl, 46 Ill. App. 462; Johnston v. Brown, 51 Ill. App. 549; Jones v. King, 86 Ill. 226–227; Oliver v. Gerstle, 58 Ill. App. 615–616.

It is objected that the cause was called for trial on Thursday instead of Monday, which by rule 18 of the Circuit Court "is set apart and assigned as the day for the trial of suits upon the short cause calendar, but any judge may postpone the call of the short cause calendar." As stated by appellant's attorney the record is silent whether the call of Thursday, May 2, 1901, when this case was tried, was pursuant to any postponement to that date. In the absence of

any showing to the contrary the "presumption is that the court, at the time of the trial, complied with its rules in respect to calling the short cause calendar." Dickinson v. Bull, 72 Ill. App. 75–77. As is said in Armstrong v. Crilly, 152 Ill. 646–648, there is nothing in the statute or the rule referred to which prohibits the judge from continuing the call of that short cause calendar from day to day, if necessary to dispose of the cases on it for trial.

There is in the record an affidavit of appellee's attorney that on the day of the trial he searched for the files in the cause without finding them, or anything to show who the attorneys for appellant were. It is urged that it was error to proceed with the trial without the files. The presumption is that the court proceeded regularly, in this respect also, and for aught that appears the files were on hand when the case was called for trial.

It may be that appellant has a good defense. But, if so, it had every opportunity to present it, by the use of ordinary diligence. We find no sufficient excuse for the failure to present its defense at the proper time, and no abuse of judicial discretion in the action of the Circuit Court overruling the motion to set aside the judgment and grant a new trial. The judgment must be affirmed.

The Alston Mfg. Co. v. Alexander Squair.

1. CORPORATIONS—*A Contract to Pay a Director Will Not Be Implied Against a Corporation.*—A contract to pay a director or officer of a corporation will not be implied as against the corporation.

Assumpsit, for a salary. Appeal from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Reversed and remanded. Opinion filed December 30, 1902.

Appellant, the Alston Manufacturing Company, a corporation, was engaged in the manufacture and sale of paints,

etc., in the city of Chicago. In 1893, appellee was secretary and treasurer of the corporation at a salary of $4,000 per annum and was also a director of the corporation. In that year he became by a definite agreement also manager of the corporation and so continued during the years 1893, 1894 and 1895, at a salary of $8,000 for the first year, $8,500 for the second and $9,000 for the third year. At the close of 1895, he was further engaged by Mr. Alston, the president, in the same capacity, at $8,500 for the year 1896. During the years 1897 and 1898 he was also a director, secretary, treasurer and manager of the corporation, continuing to hold such offices, discharge the duties thereof and receive a salary of $8,500 per annum, without, so far as appears, any new arrangements.

At the annual meeting of the stockholders held January 7, 1899, appellee was not elected a director, neither was he elected secretary or treasurer; John Alston being elected president and treasurer and Hugh Squair secretary.

Nothing was said at this meeting about discharging appellee, but on January 9th, Mr. Alston, finding appellee still at work, notified appellee in writing that his position as manager had terminated. To which appellee rejoined in writing, as follows:

"CHICAGO, January 9, 1899.

MR. JOHN ALSTON, PRESIDENT ALSTON MFG. CO., CITY.

DEAR SIR: I am just in receipt of your communication that my services as manager of the Alston Mfg. Co. are no longer required and are dispensed with. I must inform you that I decline to be discharged on one minute's notice or no notice.

I have entered upon my duties this year as in previous years, and continued to fulfill the same faithfully and can not now procure another situation so far as I know. I hold myself ready to continue my duties when wanted and shall expect to collect my full salary. My address is No. 5546 South Park avenue. Yours truly,

ALEXANDER SQUAIR."

No attention was paid to this letter nor was appellee ever asked to nor did he perform any further services for appellant. March 31, 1900, he brought suit against appel-

lant for $8,500 claimed to be due him for salary as manager for the year 1899. At the trial of said cause without a jury, the court found appellee entitled to recover a salary of $4,500 per annum from January 15, 1899, to December 1, 1899, or $3,937.50, and entered judgment accordingly, from which the defendant appealed.

JOHNSON & MORRILL, attorneys for appellant; JOHN STUART ROBERTS, of counsel.

WILLIAM ELMORE FOSTER and JOHN C. STETSON, attorneys for appellee.

MR. PRESIDING JUSTICE WATERMAN delivered the opinion of the court.

It is urged by appellee that the rule that directors of a corporation are not entitled to receive compensation for services performed by them is not applicable when the service performed does not pertain to the duties of directors, but is outside and beyond that appertaining to such office.

The question in this case is not whether appellee, as a director, is entitled to recover from the corporation, compensation for services by him performed for it, but whether upon an implied contract he can recover for services which he did not perform. It is not contended that appellee has not been fully paid for all the work he did for the company. He has recovered a judgment, not for work done for it, but by virtue of an implied contract he insists existed, under the terms of which he was and remained ready to work for it, but by virtue of which he was and remained ready to work for it from the first of January, 1899, until the first of January, 1900. The law is well settled that a contract to pay a director or officer of a corporation will not be implied as against the corporation. Vol. 17, 1st Ed. Am. & Eng. Ency. of Law, 119; Am. Central Ry. Co. v. Miles, 52 Ill. 174; Cheeney v. LaFayette, Bloomington & Mo. Ry. Co., 68 Ill. 570–574; Holder v. LaFayette, Bloomington & Mo. Ry. Co., 71 Ill. 106; Illinois Linen Co. v. Hough, 91 Ill. 63; Brown v. DeYoung, 167 Ill. 549; same v. same,

66 Ill. App. 212; Barry v. The Coffeen Coal & Copper Co., 52 Ill. App. 183; Citizens' National Bank v. Elliott, 55 Ia. 104.

In Brown v. DeYoung, 167 Ill. 549, the Supreme Court said: "There is no claim that DeYoung improperly received any moneys except by way of excessive salary, nor that he received such except with the full knowledge and acquiescence of Norden, president of the corporation;" and thereafter on page 553, the court say: "It is undoubtedly the law that a director of a corporation is not entitled, as against non-assenting stockholders, to receive a salary, however justly earned, unless previously authorized by the by-laws of the corporation or by resolution of the board of directors."

In the present case it appears that appellee was, up to January 7, 1899, a director, the secretary and treasurer of the corporation. Up to that time there could have been with him, by the corporation, no implied contract for his continuing in its service up to the first day of January, 1900.

January the seventh, 1899, by the action of the stockholders that day, he had ceased to be a director, treasurer or secretary. Nothing was said about his remaining in the service of the company in any capacity. January 9th, having been seen by the president of the company at the office of the company and engaged in its business, he was at once discharged. It does not appear that the corporation or any of its officers or agents had any notice until January 9th, that he expected to remain in the service of the company or was doing anything for it. While it does appear, as before stated, that so soon as the company was notified that he was continuing or proposed to continue in its service, it immediately discharged him. Appellee was paid up to the 15th of January, 1899.

To the making of any contract, implied or expressed, there must be a meeting of two minds. An implied contract with a corporation can not be created without knowledge of or notice to any of its officers or agents. Appellee testified that the fiscal year of the company began Decem-

ber 1st. If such be the case, it does not follow that for any of the year during which he was in its service, he was employed, his year beginning on the first of December.

The bill of particulars attached to the declaration filed by appellant contains this charge: "To service for the year A. D. 1899, Manager, $8,500." According to the bill of particulars, he claimed an employment from the 1st of January, 1899, to the first of January, 1900. The affidavit of claim filed by him was also for salary for the year A. D. 1899. He did not make a claim for salary from January 7, 1899, to January 1, 1900, or to January 8, 1900.

In the recent case of Fritze v. Equitable Building and Loan Society, 186 Ill. 183, the court on page 201 say:

"It is well settled that the directors of a corporation who control the finances and property, are not entitled to compensation for the performance of their duties, unless such salary is fixed by the by-laws or by a resolution of the board before the services are performed. It must appear that the by-laws or resolution has been adopted, authorizing and fixing the allowance, before the services are rendered."

Appellee claimed to recover, not for services performed, but by virtue of an implied contract he insists existed. It not appearing that the company had in any way notice that he claimed that there was such contract or was performing any service for it, before January 9th, when it immediately discharged him, he can not recover in this action for services he did not perform.

The judgment of the Superior Court is reversed and the cause remanded.

H. J. Fitzgerald v. George P. Gore.

1. PRACTICE—*Power of Court Over Judgment Rendered at Prior Term.*—After the expiration of the term of court at which a judgment has been rendered, the court that rendered the judgment has no supervisory power over it, except to amend it in a mere matter of form, upon notice to the opposite party.

2. SAME—*Court Will be Presumed to Have Done its Duty.*—Where it is the duty of the court to enter a judgment, and it can be fairly inferred that the court did make such order, and that through mistake of the clerk it has not been spread of record, it should be so held.

Replevin.—Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANECY, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Affirmed. Opinion filed December 30, 1902.

ALDEN, LATHAM & YOUNG, attorneys for appellant.

FLOWER, VROMAN & MUSGRAVE, attorneys for appellee.

MR. JUSTICE BURKE delivered the opinion of the court.

The appellant sued out of the Circuit Court of Cook County a writ of replevin. The sheriff executed the same by replevying a portion of the property therein described and turning it over to appellant. Issues were joined in the pleadings and the case was called for trial June 29, 1898, when the plaintiff elected to take a non-suit. Thereupon an order was entered in the cause as follows:

"This cause being called for trial, came the parties, by their attorneys, respectively. Thereupon the plaintiff elects to take a non-suit. Therefore, it is considered by the court that the defendant do have and recover of and from the plaintiff his costs and charges in this behalf expended and have execution therefor.

"It is ordered that a *retorno habendo* do issue herein and for the return of the property replevied herein by virtue of the writ of replevin issued in said cause."

Nothing further was done in the cause until June 29, 1901, when upon motion of appellee to amend the said order of June 29, 1898, the court entered the following order:

"This cause having come on to be heard on the motion of the defendant to amend the record of the order and judgment rendered on the 29th day of June, 1898, and due notice of said motion having been given to the plaintiff and defendant, appearing in court by their respective attorneys, and the court having heard the counsel for both the plaintiff and defendant and fully advised in the premises,

The court finds that on the 29th day of June, 1898, the judgment was rendered in this case, among other things,

that the defendant have and do recover of the plaintiff a return of the property taken under the writ of replevin issued in this case and that the clerk of this court has omitted to set forth said judgment in the record of said order and judgment of June 29th, 1898.

It is therefore ordered by the court that the record of said order and judgment of June 29th, 1898, be and the same is hereby amended so as to read as follows:

H. J. FITZGERALD
vs. } 162,683.
GEORGE P. GORE.

This cause being called for trial, came the parties by their attorneys respectively, thereupon the plaintiff elects to take a non-suit, therefore it is considered by the court that defendant do have and recover of and from the plaintiff a return of the property taken under a writ of replevin herein and also his costs and charges in this behalf expended and have execution therefor.

It is further ordered that a *retorno habendo* do issue herein for the return of the property replevied herein by virtue of the writ of replevin issued in said cause. And the clerk of this court is hereby ordered and directed forthwith to spread this order of record in said cause."

Appellant excepted to this amendment and prosecutes this appeal from the order of June 29, 1901, amending the order of June 29, 1898. The abstract recites:

"No evidence of any kind was submitted to the court unless it can be said that the memorandum appearing upon some wrapper of the files as follows: 'June 29, 1898, Han. Pltf. elect to take non-suit P. C. & Jt. & Reto. Habo.,' can be considered as in evidence."

The abstract further recites that the amendment was made entirely from what appeared on the face of the record. The errors assigned all relate to the correctness of the orders of June 29, 1901, amending the order of June 29, 1898. Plaintiff (appellant) contends that the court was without jurisdiction to enter such amending order, because the term had passed at which the original order was entered and that the order of amendment was one of substance. We are of the opinion that the court committed no error in entering the order of June 29, 1901, and thereby amending the judgment order of June 29, 1898. In the original

order it is ordered that a *retorno habendo* do issue for the return of the property replevied. The amended order is that the defendant do have and recover of the plaintiff a return of the property taken under the writ of replevin and further ordered that a writ of *retorno habendo* issue therein. The Supreme Court has uniformly, and in a number of cases, held that after the expiration of the term of court at which a judgment has been rendered, the court that rendered the judgment has no supervisory power over it at a subsequent term, except to amend it in a mere matter of form, upon notice to the opposite party. Cook v. Wood, 24 Ill. 295; McKindley v. Buck, 43 Ill. 490; State Savings Institution v. Nelson, 49 Ill. 172; Lill v. Stookey, 72 Ill. 495.

In Lill v. Stookey, *supra*, it was held that when a replevin suit is dismissed and a judgment rendered against plaintiff for costs, the court rendering the judgment can not at a subsequent term so amend the record as to determine that the defendant recover the property in question from the plaintiff and order a writ for its return. Such an amendment is not formal or clerical; on the contrary it is an amendment of the most substantial character. In this case of Lill v. Stookey, the court uses the following language: "It is true the court upon dismissal of the writ in the first instance had the right to award a writ of *retorno habendo*, but because the court failed to do this, it by no means follows that several years afterward the court can sit in review of its own judgment." But in no case to which our attention has been called, where it was held error to amend, does it appear that there was an order for the issuance of a writ of *retorno habendo*. Courts will not willingly hold these words to have no meaning. Under the pleadings, facts and law, it was the duty of the court in this case to have entered a judgment for the return of the property, and if it can fairly be inferred that the court did make such order, and that through mistake of the clerk it has not been spread of record, but from the memoranda it is evident that the court made the order, it should be so held. Denhard v. Dunbar, 98 Ill. App. 266.

In the American Preservers' Company v. Bishop, 83 Ill. App. 493, an original order and amendment thereto are found in the precise words of the orders in the case at bar, and there it was held that the omission of a formal judgment from the original order was a mistake or misprision of the clerk, and there citing authorities to sustain such holding. This case was appealed to the Supreme Court, and is reported in 184 Ill. 68. It is true that the Supreme Court did not have occasion in that decision to state whether the original order was a sufficient memorial by which to amend. It was held in the Appellate Court that the omission to enter a judgment, that the defendant have a return of the property, was a mistake of the clerk. The same question arose in the same case in this court, and is reported in 88 Ill. App. 443, where the court states that the appeal was prosecuted upon the alleged ground that the court could not properly enter said order, there being no minute of the judge or memorial paper upon which to base such amendment, and in that case the contention of the appellant was overruled and the judgment of the Circuit Court was affirmed. Counsel for appellant insist that the Supreme Court in Rohe v. Pease, 189 Ill. 207, in effect overruled the decision of the Appellate Court in the American Preservers Company v. Bishop, 83 Ill. App. 493, but the only point decided in that case is that in replevin a plea of *non cepit* only puts in issue the taking of the property and does not authorize a judgment for *retorno habendo*. We shall adhere to the former holdings on this subject and affirm the judgment.

The judgment of the Circuit Court is affirmed.

Michael J. Considine et al. v. Fred E. Lee.

1. PRACTICE—*Setting Aside Defaults Rests Largely in Legal Discretion of the Trial Court.*—Setting aside defaults rests largely in the discretion of the trial court, and it is not improper to refuse to set aside the default where the defaulted party has failed in the exercise of proper diligence, even though he has a good defense on the merits.

Assumpsit, upon a promissory note. Appeal from the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Affirmed. Opinion filed December 30, 1902.

C. S. O'MEARA, attorney for appellants.

ALFRED E. BARR, attorney for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

This is a suit upon a promissory note, in which the trial court entered judgment against appellants for want of compliance on their part, with a rule to plead.

It appears that the defendants had entered their appearance, but had failed to plead, or demur to the plaintiff's declaration, when, July 3, 1901, being the default day of the Superior Court for cases wherein service of summons was had for that term, their default was entered. Upon motion of appellants this default was set aside July 6th thereafter, and they were given leave "to plead by ten o'clock A. M., July 8, 1901," as appears from the abstract filed herein. No pleas having been filed within the time specified, shortly after the expiration of the time allowed, default was again taken of record for want of plea, and judgment entered. At 2 o'clock P. M. of the same day the motion to set aside was made, the denial of which is assigned for error.

An affidavit that the defendants have a good defense was filed to the effect that a certain quantity of hay, guaranteed to be of good quality, for the purchase price of which the note was given, was of an inferior quality, and not merchantable. It is urged that having thus shown a meritorious defense, and being ready for trial, appellants were entitled to have the default set aside. The record shows clearly a failure to file pleas within the time granted, when the original default was set aside. Twice in immediate succession appellants had allowed themselves to be defaulted. While it is true, as stated in Mason v. McNamara, 57 Ill. 274, that the practice has been, and we think it may, and should be in proper cases, "liberal in setting aside defaults at the

term at which they were entered, where it appears that justice will be promoted thereby," yet what shall be done in this respect in particular cases must be left largely to the legal discretion of the trial court. Where it appears by affidavit that the party has a defense to the merits, "it has been usual to set aside the default if a reasonable excuse is shown for not having made the defense. It has also been the practice to impose reasonable terms upon the defendant as a condition to allowing the motion." Mason v. McNamara, *supra*. In the present case no excuse at all appears in this record for not filing pleas in the first instance. When the default taken in consequence of such neglect or failure was set aside the court exercised its discretion in favor of the appellants, giving them an opportunity to retrieve themselves from the consequences of their former failure. This they failed to avail themselves of. It was no hardship to require them to file their pleas within the time set, and no reason appeared why with ordinary effort the rule could not have been readily complied with. It was not complied with, and the court had no means of knowing, when again entering default and giving judgment for non-compliance, that appellants' attorney intended to or would file his pleas within a short time thereafter, or at all. No reason is shown for their not being filed in time. Though the defaulted party has a good defense on the merits, but has failed in the exercise of proper diligence, it is not improper to refuse to set aside the default. Mendell v. Kimball, 85 Ill. 582. In that case it is said: "The public service, the successful transaction of business, requires the enforcement of wholesome, general rules, although hardship may be the result in some cases."

The judgment of the Superior Court is affirmed.

105 249
a204s 418

John W. Poehlmann v. Barbara Kertz.

1. EVIDENCE—*Of Seduction Admissible in Action for Breach of Promise of Marriage.*—Evidence of seduction in an action for breach of promise of marriage is admissible, though the seduction is not charged in the declaration. It is not necessary to plead that which is merely evidence.

2. DAMAGES—*In Actions for Breach of Promise of Marriage.*—The jury in cases of breach of promise of marriage are entitled, when they find the contract of marriage made and broken, to take into consideration all the facts and circumstances of the case, and particularly the conduct of the defendant in his whole intercourse with, and treatment of, the plaintiff.

Breach of Promise of Marriage.—Appeal from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Affirmed. Opinion filed December 30, 1902.

Statement.—This was an action begun by Barbara Kertz, appellee, against John W. Poehlmann for breach of promise of marriage contract. Judgment was entered upon the verdict of the jury assessing damages at $2,500. Attorney for appellant urges in his argument two grounds of error: first, that the court admitted evidence of seduction although not specially pleaded; second, that an instruction on seduction was improperly given. In discussing these alleged errors, all the assignments of error made by appellant, so far as may be found necessary, will be discussed. Mr. Poehlmann was a florist and a widower with two children, three and four years of age. In 1894 he first met Barbara Kertz, the plaintiff, at his brother's home. She was there employed as a domestic. After an absence of some years she returned to work in his brother's family in June, 1898. Plaintiff (appellee) testified as follows:

"In August, 1898, I was preparing to leave for a few days, when the defendant asked me to be his housekeeper. The next morning he asked me if I would sooner get married to him. I said, 'I will see about it.' Several weeks later he said, 'Have you thought that matter over we were speaking about?' I said, 'If you want to marry me you will

have to marry a poor girl without money.' He said, 'I am not looking for money now.' Besides, I said, I am a Catholic and you are a Protestant. He said that made no difference. After that he said, 'Do you really object to marrying me? Will you promise to marry me?' I said, 'I will promise to marry you.' He then asked me if I did not want to go to some summer resort; he said he would give me the money. When I was going home he said, 'You come down to the store to-morrow and we will go out to Jackson Park and spend the day before you go.' We spent the time in the store until the train left. At the depot he bought me flowers and fruit, and asked me to write. I did write him and had two or three letters from him. He wrote he was coming up to see me on August the fifth. I met him at the depot. He bought me flowers and gave me a diamond ring. He said, 'Here, I have a ring for you which I ought to have given you long ago.' I asked him what Mrs. Poehlmann (his brother's wife) said about it when he told her and he said she felt badly about it, to think she had been such a good friend of mine and I did not tell her anything about it. He then objected to my going to work; said if I wanted to work, to go and keep house for him. He left on the sixth; he said he could not stay longer on account of business. On the way to the depot he said, 'You ought to write first.'"

Plaintiff wrote to defendant on August 22, 1899. Defendant never answered this letter. Plaintiff further testifies:

"I came to Chicago and went to work on the 12th day of September. The first opportunity I had, I went to the store and found the defendant. He said, 'I suppose you came down to find out what the matter is.' I said, 'Yes.' He said, 'Barbara, I have changed my mind.' I said, 'What is the reason for this?' I asked if my parents were not in the circumstances he expected. He said, 'No, I expected things different.' He said, 'When I came up to visit you, you did not have some present for me and not a decent meal on the table.' I said, 'You are a different person from what I expected to be dealing with entirely, and that gives me to understand what you are saying, what you mean.' I turned and went out. That same evening I wrote him a letter and asked him what his real reason was, but I never heard from him afterward. Before I left for home he told me that I had better tell my folks about getting married,

because he intended to come up, and I told my folks. He then said he would like to get married in three weeks."

Defendant wrote to plaintiff July 24, 1899, and another letter a few days thereafter, wherein he states as follows:

"I do wish you were here so we could chat together about our future plans. Well, I don't expect to be alone very long any more, that's one consolation. It will be more pleasant after we are once married and settled. Have you told your folks already? If not you had better tell them; might come up to see you next Saturday. Say, old girl, you sent lots of kisses for the babies; where do I come in? I suppose I will have to wait for the genuine ones, but I will have some extra ones coming, and don't forget it. Yours forever. Many kisses from me and the babies."

Letters in the most affectionate terms were written by defendant to plaintiff prior to the time of defendant's visit to plaintiff's home on the 5th of August, 1899. In May, 1899, defendant said:

"'Wisconsin has taken out a license for marriage; that spoils the couples from going down there; we will go over to Michigan, and get secretly married. Then we can go to housekeeping when we feel like it.' I told him it was not very nice to get married secretly, that Chicago was good enough for me, and he says, 'if it is good enough for you, it is good enough for me.'"

Defendant testified that his first conversation on the subject of marriage was in January, 1899, and he testified:

"I took a liking to the girl and said to her, I might make up my mind to get married to her. If I said anything to her in May, 1899, about marrying her, it was maybe in a joke. About July the 15th, 1899, I told her to come down to the store and see me before she went away. Told her I was going to come up and see her, and she asked me what my intentions were in regard to getting married; I said, I could not make any promise to her because I wanted to get acquainted with her folks. I did not see anything wrong with her. I went up to Port Washington to see her. On the way from the depot to her home I gave her the ring. She asked me if I was hungry; I said I was. She said she would get supper for me. All we had was beer, a piece of sausage and some bread. She said she would get me some pie or cold coffee. I said I did not care for either. After

the old folks retired, and between twelve and one o'clock, I asked her if she had intercourse with any other man; I want to know it before I go any further. She told me that she was engaged when she was about sixteen years old to a man with whom she had been going for about three years and that she had had intercourse with him; that he went out west and was shot."

Mr. Weirich, a barkeeper, testified in behalf of defendant that in 1894 he had intercourse with the plaintiff. Plaintiff in rebuttal testified that she did not at any time have intercourse with the witness, Weirich. Attorney for plaintiff asked: "Did you ever have sexual intercourse with any man?" Answer: "Mr. Poehlmann, the defendant." Objection by defendant.

The Court: "If you had objected to the question, I would have sustained the objection; but having waited until the answer came, it was too late."

Plaintiff further testified as follows:

"Defendant asked me if I would grant him favors. He said, 'I will buy you just as nice diamonds as any woman wears in Chicago.' I said, 'I am not looking for any diamonds, I don't intend to do any such thing.' He said, 'Well, what need you be particular, for we will get married anyway.' And upon his saying that I yielded to him about a day or two thereafter, when he again repeated that he would marry me."

OSCAR HEBEL, attorney for appellant.

MCCLELLAN & SPENCER, attorneys for appellee.

MR. JUSTICE BURKE delivered the opinion of the court.

After reading the evidence introduced in this case, no doubt can be entertained that the defendant, appellant, did promise to marry the plaintiff. It is true he makes denial, and says that if he made a promise of marriage "it was maybe in a joke." His statement that he gave her a diamond ring and talked with her after the midnight hour alone in a manner as no man would, and his written admission of agreement to marry plaintiff, together with the other evidence in this case, convinces us that he had prom-

ised to marry her and even anticipated some of the marital rights.

An examination of the evidence will, we think, completely refute the suggestion of appellant, that the promise of marriage by defendant was made in consideration of sexual intercourse; we therefore find that the promise of marriage in this case was not based upon any immoral consideration and that the court did not err in refusing to exclude the evidence and instruct the jury to find the issues for the defendant.

There is no averment of seduction in the declaration in this case. It is therefore contended by appellant that evidence of seduction can not be received, since it has not been specially pleaded in this case, and because the law does not imply that damages for seduction are a natural result of a breach of promise of marriage.

In Fidler v. McKinley, 21 Ill. 308, is found a case similar to the one at bar. The declaration therein contained no averment of seduction, and yet the court allowed evidence of seduction and specifically instructed that the seduction might be taken into consideration by the jury in aggravation of damages. The argument of counsel for appellant, that evidence of seduction was improper in this case and an instruction permitting the jury to consider seduction in aggravation of damages should not have been given, was very vigorously stated in a dissenting opinion of Judge Breese. But the opinion of the court in Fidler v. McKinley remains the law of this state on these subjects, and is, therefore, decisive of these questions. In this case the court further says:

"In the case of Tubbs v. Van Kleek, 12 Ill. 446, the court held that in actions for breach of promise of marriage, a seduction, if in consequence of a promise, may be given in evidence in aggravation of damages. In that case the authorities were fully reviewed, and the decision made on mature deliberation, and we are satisfied that the rule there adopted is correct in principle and just in its operation, and are unable to see any reason for its being overruled or modified."

In Lowden v. Morrison, 36 Ill. App. 495, it is held that evidence of seduction in an action for breach of promise of marriage is admissible, though the seduction is not charged in the declaration. It is not necessary to plead that which is merely evidence.

The weight of authorities in other states is that general allegations of a promise to marry and its breach, will permit evidence of seduction. 3d Am. & Eng. Ency. Pl. & Pr. 688, and cases there cited under article, Breach of Promise of Marriage.

The record bearing on the subject of seduction shows that evidence relating thereto was brought out through the attempt of appellant to prove that plaintiff was not virtuous. The counsel for appellant did not object to the question which called out the answer that plaintiff had intercourse with defendant. In considering this portion of the case, we think no injustice was done the defendant. The verdict of the jury was $2,500, and is claimed by appellant to be excessive. In Thorn v. Knapp, 42 N. Y. 474, it is said, that "if the defendant comes into court and attempts to prove the plaintiff guilty of misconduct with other men of which he knew she was not guilty, or when the misconduct was committed with himself, it aggravates the injury and aggravates the claim to damages." This proposition is based on the principle that the jury in cases of breach of promise of marriage were entitled, when they found the contract of marriage made and broken, to take into consideration all the facts and circumstances of the case, and particularly the conduct of the defendant in his whole intercourse with and treatment of the plaintiff.

There is evidence in the record tending to show that defendant was a man of experience in the world; had children of his own; promised the plaintiff to marry her; caused her to make public announcement to her family and friends of her engagement, and after the assurance of marriage, led her to surrender her person to his passion, and then, upon the flimsy pretext that her parents were a little poorer than

he had supposed, abandoned her. It is entirely probable that from this evidence the jury may have believed that defendant had no regard whatever for the person and virtue of a woman who had trusted him and whom he had ruined and brought into disgrace among her friends in Chicago, and at the home of her parents in Wisconsin. In this class of cases a jury is particularly fitted to determine the amount of the damages, and we see no reason in this case to disturb their verdict.

The principal objection of appellant to the instructions of law is that they do not accurately state the elements of damage which the jury might properly consider in fixing the amount of their verdict.

In view of the position taken in this opinion we shall not extend it by a further discussion of these instructions, but say that in them we find no reversible error.

Judgment of the Superior Court is affirmed.

Peter Van Vlissingen v. William J. Manning.

1. REWARDS—*Rule as to Payment Based upon the Principle Applicable to Contracts.*— The rule as to the payment of an offered reward is based upon the principles applicable to contracts; it being universally held that if one having knowledge of an offered reward does that for which the offer is made, by such performance there is a meeting of minds and a contract made.

2. SAME—*One Claiming a Reward for Doing a Certain Thing Must Have Known of Reward.*—In the case of an offered reward for the doing of a certain thing, the act of one who, knowing of this, performs the condition, creates a contract; the performance constitutes both acceptance and fulfillment.

3. CONTRACTS—*A Mere Offer Does Not Constitute.*—A mere offer not assented to, does not constitute a contract.

4. COMMISSIONS—*Person Procuring Customer in Response to an Offer of a Broker to Divide His Commission Must Show Acceptance by Both upon Conditions of Offer.*—Defendant issued a circular setting forth that he had money to loan and would divide commissions evenly with parties bringing borrowers. Plaintiff brought a customer to him who negotiated a loan. *Held*, in order to recover the share of commissions offered in the circular, plaintiff must show knowledge by defend-

ant of his expectation to receive a portion of the commission, or notice that he had brought the borrower to defendant because of the circular; and that from the circumstances, defendant, as a reasonable man, should have understood that plaintiff expected commissions to be equally divided.

Assumpsit, for commissions. Appeal from the Superior Court of Cook County; the Hon. GEORGE W. PATTON, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Opinion filed December 30, 1902. Remittitur filed and cause affirmed January 2, 1903.

WILLIAM W. CASE, attorney for appellant.

GEORGE S. COLE, attorney for appellee.

MR. PRESIDING JUSTICE WATERMAN delivered the opinion of the court.

In the spring of 1895 there was issued and sent by appellant, to lawyers, real estate agents and others in Chicago, a printed circular setting forth that appellant had money to loan on first mortgage on improved property and would divide commissions evenly with parties bringing borrowers. Appellee, a lawyer, received one of such circulars and testifies that in reply thereto he wrote to appellant that a Mr. Bishopp wished to obtain a loan of $17,000 or $18,000 on certain improved property. Upon the trial, being asked if there was anything else in the letter that he remembered, it not being produced, he stated that he remembered he gave the location of the property and that Mr. Bishopp valued it at $35,000; that he believed that what he had stated was the substance of the letter. Upon being asked if there was any reference to commissions in the letter, over objection, he stated: "I remember acknowledging receipt of his circulars offering to divide the commissions evenly." This was not a clear statement that he remembered there was anything in the letter about commissions. From other evidence it appears that the date of this letter was April 19th, and the witness on cross-examination stated that in this letter the circular issued by appellant was referred to. To the letter sent by appellee April 19th appellant replied, enclosing an application for a

loan to be signed by Mr. Bishopp. Mr. Bishopp signed the application and appellant procured for him the sum of $16,000, with interest at six per cent per annum, receiving from him as a commission for procuring the loan, $320. It does not appear that any time prior to the actual making of the loan, appellee notified appellant that he would expect one-half the commission paid upon such loan, in any way other than by that which appellee testifies was in the letter sent by him upon the 19th of April, 1895. Shortly after making the loan appellee wrote to appellant demanding $160, being one-half of the commission. To this letter appellant at once replied denying that he owed appellee anything and refusing to pay.

Upon the trial there was read in evidence, without objection, the correspondence which passed between the parties after the loan was made, with respect to the payment of commissions. Among this, a letter dated September 17, 1895, written to appellee by Mr. Watson, who was a clerk in the office of appellant at the time the loan was applied for and made, and who had to do with the transaction. In this letter is contained the following, which, though clearly hearsay, seems to have been admitted without objection:

"I will say further that when I mentioned your name to Mr. Bishop in connection with the loan, that he volunteered the information that you would not expect any part of the commission as you had merely acted as his representative."

Appellant upon the trial was not permitted to introduce in evidence a memorandum made by Mr. Watson the 25th of April, 1895, concerning the loan. Mr. Watson testified as to the making of the memoranda and further that he did not make it with reference to the letter of appellee dated April 19th and that he did not remember the contents of the letter of April 19th.

As before stated, appellee had testified to the contents of such letter as remembered by him. Mr. Watson testified that he wrote the reply of appellant to the letter of appellee dated April 19th and that when he did so he had that

letter before him. After he had stated that he did not remember the contents of the letter of April 19th, he was asked whether or not there was in it any reference to a division of commissions and also whether he remembered if in it there was any reference to a division of commissions. These questions the court refused to permit him to answer. We think the questions proper. While he did not remember and could not state the contents of the letter, he may have been able to state that certain things material to this controversy were not in it, that is, he may have been able to state that there was in it no reference to commissions. It is very frequently the case that a witness may not be able to state the contents of a paper which he has written or read and yet may be able to say that certain things were not in the paper. We do not think that memoranda made by Watson was admissible. It was not made as a record of something then done by the maker or seen or heard by the maker, but as a conclusion to which he or some one else had come as to a division of commissions. And if the position of appellant be well taken, it was not made in respect to a business or transaction with which appellee had anything to do. Appellant testifies that the letter of April 19th, addressed to him by appellee, did not contain anything calling attention to a circular offering to divide commissions.

The court found for the plaintiff and allowed him $160 as commissions, with interest thereon to the time of the trial. The issue presented is not altogether like that of the offering of a reward for arrest of certain parties or the return of lost or stolen property.

Appellant was in the business of procuring, for a commission, loans for parties who applied to him. No one was entitled to any portion of the commission he earned in such business, save by virtue of a special agreement by appellant.

If there were, prior to the making of the loan, nothing putting him upon notice that if a loan was made to Mr. Bishopp as requested by him, appellee would expect that

the commissions therefor would be evenly divided with him, appellant is not liable to appellee for one-half the commissions. The rule as to the payment of offered reward is based upon the principle applicable to contracts; it being universally held that if one having knowledge of an offered reward does that for which the offer is made, by such performance there is a meeting of minds and a contract made. By many courts it is said that if one, without knowledge of an offered reward, do that for which the offer is made, he is entitled to the reward. Vol. 7, 2d Ed. Am. & Eng. Ency. of Law, 137.

The question in this case in this regard is whether appellant had, prior to the making of the loan, notice that appellee expected that commissions would be equally divided with him. We do not wish to be understood that such notice must have been in clear and unequivocable terms. It is sufficient if the circumstances surrounding the transaction were such that a reasonable man in the position that appellee was, would have inferred therefrom that appellee expected that commissions would be equally divided with him. C. & A. Ry. Co. v. Sebring, 16 Ill. App. 181, 6th Ed. Parsons on Contracts, Vol. 1, page 74.

In the case of Babcock v. Henry J. Raymond and others, 2 Hilton, 61, there had been issued by the New York Daily Times, the following:

"Notice to correspondents: Voluntary correspondence, containing important news from all quarters of the world, is solicited; if used, it will be liberally paid for."

The plaintiff, Babcock, sent to the Times a communication containing political news thought by the publishers of the paper to be of importance enough to justify its publication and it was published. In a letter accompanying this news, the plaintiff asked the defendants if it was not liked to return, that he might get a market for it elsewhere, thus as the court say, "plainly informed them that it was intended for sale, and if they used it he was to be paid what it was reasonably worth." Upon this state of facts judgment was given the plaintiff for what the evidence showed the article to be worth.

A mere offer, not assented to, does not constitute a contract. McKinley v. Watkins, 13 Ill. 140; Olney v. Home, 89 Ill. 556; Minnesota Lumber Co. v. Whitebreast Coal Co., 56 Ill. App. 248.

In the case of an offered reward for the doing of a certain thing, the act of one who, knowing of this, performs the condition, creates a contract; the performance constitutes both acceptance and fulfillment.

In the case at bar, the mere bringing of one who desired to borrow would not have been a performance of the condition; to this there was necessary that the would-be borrower be accepted, make a loan through appellant and he become entitled to commissions.

Following the act of appellee it was necessary that there be action as an assent upon the part of appellant. It would have been no breach of the terms of his proposal if he had refused to make any loan to the would-be borrower sent by appellee. It is therefore essential to the validity of appellee's claim for commissions that appellant should, before his action and assent, have had reasonable notice of the expectations of appellee.

In saying this we leave out of consideration the effect of bad faith; a subterfuge upon the part of one sending such a circular, by which he appears to have made no loan or received no commissions, while in reality he does both; there being nothing of the kind in this case.

Interest was not allowable upon the claim of appellee. It is not claimed that there was an unreasonable and vexatious delay of payment, but that there is money due to appellee on an instrument in writing. In other words, upon the circular issued by appellant.

The circular, by itself, did not give appellee any right to receive commissions. His right to receive commission thereunder, depended not only upon his procuring and tendering to appellant a person who wished to obtain a loan, but also upon the conclusion to which appellant might come as to making a loan to such applicant, and, as has been said, upon appellant's having, prior to the making

of the loan, such notice of the expectation of appellee that he would receive a portion of the commission, or notice that he had brought the borrower to appellant because of the circular; and that from the circumstances, appellant, as a reasonable man, should have understood that appellee expected commissions to be equally divided. A person can not be held to have entered into a contract concerning which he had not reasonable notice one was contemplated.

Applying this rule to the evidence in this case, we are of the opinion it appears therefrom, that appellant had, under the circumstances, reasonable notice that appellee in response to his, appellant's, circular, had sent his client to obtain a loan and expected that the commissions therefor would be divided. Even if the letter sent by appellee contained no reference to commission, appellant ought, as a reasonable man, to have understood that appellee, a lawyer, entering upon the business of procuring a loan for his client, expected to be paid therefor and that the client was before appellant because of his circular. We do not think that the error pointed out affected the conclusion arrived at as to the issue of fact, nor that the judgment should therefore be reversed.

If appellee shall within ten days remit from the judgment, $40, the amount of interest allowed, the judgment will be affirmed as of its date, for $160, otherwise the judgment will be reversed and the cause remanded.

Appellant will recover costs in this court.

---

105 261
r205s 273

Webster Mfg. Co. v. Adam Nisbett.

1. EVIDENCE—*Province of Jury Where it is Conflicting.*—Where the evidence is conflicting, it is the province of the jury to decide on which side the greater weight of credible evidence is.

2. MASTER AND SERVANT—*Servant May Assume that Appliances Furnished are Sufficient for Their Purpose.*—As a general rule the servant has the right to presume that the materials and appliances

which are furnished to him in the performance of his duty are sufficient therefor; but where the servant has equal knowledge with the master, and a full knowledge of all existing defects, and more especially in the performance of ordinary labor in which no intricate machinery is involved, the rule is not applicable.

3. SAME—*Servant May Remain in Employ of Master for a Reasonable Time Awaiting Remedy of Defects.*—The servant may remain in the employ of the master for a reasonable time awaiting the remedy of defects in machinery, of which he has notified his master.

4. SAME—*Where Danger of Continuing Use of Tool is Imminent.*—Where the danger of continuing the use of the tool or appliance is so imminent that an ordinarily prudent and careful person would not continue to use it, the servant continues the employment at his own risk.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge presiding. Heard in this court at the March term, 1902. Affirmed. Opinion filed December 22, 1902.

O. W. DYNES, attorney for appellant.

FRANCIS T. MURPHY, attorney for appellee; EDWARD C. HIGGINS, of counsel.

MR. JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a judgment in favor of appellee and against appellant for the sum of $6,000, rendered in an action on the case. The appellant is engaged in the city of Chicago in the manufacture of gas engines, etc., and some time prior to September 23, 1897, employed appellee as a blacksmith. In the afternoon of September 23, 1897, appellee was engaged in forging a piece of iron required to be in the shape of a T. One Neunschwander was his helper in doing the work. The work was done with two tools called, respectively, a set hammer and a backing hammer. The set hammer was used by appellee. He placed it against the iron which he was engaged in forging at such places as he wished blows to be struck, holding it there, and his helper then struck with the backing hammer on the set hammer so held by appellee. On the afternoon of September 23, 1897, while the work was proceeding as described, the helper struck a blow with the backing hammer on the

set hammer held in place by appellee, and a small particle of iron flew up and struck appellee in the left eye, destroying the eye.

There are numerous counts in the declaration, but the complaint stated in the declaration on which the right of recovery is based is, in substance, that the defendant, appellant here, furnished the helper of the plaintiff, appellee here, with an old, insufficient and dangerous backing hammer, with which to perform the duties assigned to such helper, of which condition of the backing hammer the defendant was notified and promised to repair the said hammer or furnish a suitable one in lieu thereof, and so induced the plaintiff to continue in the performance of the work with the said helper, etc., alleging the accident.

The jury, in addition to their general verdict finding the defendant guilty and assessing damages, found, in answer to special interrogatories, that the piece of metal which struck the plaintiff's eye came from the backing hammer.

The contentions of appellant's counsel are that the general and special verdicts are contrary to the evidence; that the injury arose from a risk assumed by appellee; that a promise to repair has no application to a simple tool like the backing hammer in question; that the injury was the result of an unavoidable accident; that appellee did not exercise ordinary care for his own safety, and that the court erred in ruling on evidence, and in instructing the jury. The evidence is voluminous, as it usually is in the class of cases to which this belongs, and can not be referred to in detail in an opinion of reasonable length. The evidence for appellee tends to prove the following facts: That the backing hammer used by the helper was old, chipped, in bad condition, and such that, in striking with it on the set hammer, particles were apt to fly from it; that two days before the accident appellee's helper, in appellee's presence, showed the hammer to appellant's foreman, and that the foreman looked at it and said he would get it fixed; that, in the forenoon of the day on which the accident occurred, and before it occurred, appellee took the backing hammer

to the foreman, asked him for the privilege of dressing it and making it right, and that the foreman looked at the hammer and said it was good enough; but appellee said no, that it had been chipping off, and might chip again, and that it was not exactly safe to work with, and the foreman then said: "Well, go ahead and use it now, and I will fix it, or get some one to fix it soon. Don't stop that job; I am in a hurry;" that the particle of iron which destroyed appellee's eye was a chip which flew from the backing hammer when the helper struck a blow with it on the set hammer. Dr. Edward M. Brown, who attended appellee after the accident, testified that he found in his eye a piece of steel about a quarter or five-sixteenths of an inch square and about as thick as a dime. Appellee's evidence also tended to prove that appellee could not repair the backing hammer without permission from the foreman.

Ole Paulsen, appellant's foreman, testified that the backing hammer was not shown to him, and that he made no promise to repair it. The testimony of other witnesses for appellant was contradictory of appellee's witnesses on material matters, but in this conflict of the evidence it was the province of the jury to decide on which side the greater weight of credible evidence was; and we are of opinion that the jury was warranted by the evidence in finding for appellee. Appellant put in evidence a backing hammer and a set hammer, the latter in apparently very bad condition, and claimed that the particle which destroyed appellee's eye flew from the set hammer in evidence; but the evidence tends strongly to prove that the set hammer in evidence is not the one used by appellee at the time of the accident.

The theory of appellant's counsel, on which the contention is based that appellee assumed the risk of injury from flying particles of iron, when doing his work, is, that such particles will fly under the most favorable conditions; but the preponderance of the evidence is that they are much more likely to fly from an old tool which has become chipped and in bad condition from use. Some of appellant's wit-

nesses admitted this on cross-examination. We can not sustain the contention that appellee assumed the risk of the use of tools in bad condition, and the fact that he went to the foreman and complained of the condition of the backing hammer, and was only induced to continue using it by the foreman's promise to have it repaired, is against appellant's contention. The contention could only be sustained on one of two hypotheses—either that all tools furnished by appellant to its employes were in bad condition, and that appellee knew this when employed, or that the tool in question was in bad condition, of which appellee had knowledge, notwithstanding which he continued to use it, without complaint, and without any promise of his employer to repair it. Appellee, at the time of the accident, was, as appears from the evidence, performing his allotted work in the usual way, and the objection that he did not exercise ordinary care for his personal safety finds no support in the evidence.

Decisions of the courts of other states are cited by appellant's counsel, in support of the proposition that a promise to repair is inapplicable, so as to create liability, to a simple tool such as a hammer. No such doctrine has been announced in this state. On the contrary, the Supreme Court, in Illinois Steel Co. v. Mann, 170 Ill. 200, 207, plainly intimates, as we think, that the doctrine contended for is not the law in this state, saying:

"As a general rule courts will consider that the master who employs a servant has a better and more comprehensive knowledge of the machinery and materials to be used than the employe. The servant has the right to presume that the materials and appliances which are furnished to him in the performance of his duty are sufficient therefor. This rule, however, is not applicable to all cases, and where the servant has equal knowledge with the master and a full knowledge of all existing defects, and more especially in the performance of ordinary labor in which no intricate machinery is involved, the rule is not applicable. In Marsh v. Chickering, 101 N. Y. 400, this exception is recognized, and it is said that the facts that a laborer using ordinary tools and appliances notified the master of a defect of

which the servant himself had full knowledge, and asked it to be remedied, and the master promised so to do, do not render the master responsible. The rule in this state is more liberal, however, and permits the servant to remain in the employ of the master for a reasonable time awaiting the remedy of such defects."

We do not feel warranted in treating the question as an open one in this state.

The rule, in case of a promise to repair, is, that unless the danger of continuing the use of the tool or appliance is so imminent that an ordinary prudent and careful person would not continue to use it, the employe may continue its use for a reasonable time to allow performance of the promise. Drop Forge & Foundry Co. v. Van Dam, 149 Ill. 337.

In Missouri Furnace Co. v. Abend, 107 Ill. 44, 52, the court state the reason of the rule thus:

"The reason upon which the rule is said to rest is, that the promise of the master to repair defects relieves the servant from the charge of negligence by continuing in the service after the discovery of the perils to which he would be exposed."

In Anderson Pressed Brick Co. v. Sobkowiak, 148 Ill. 573, 582, the court go still further, saying:

"When the master has knowledge of the defects and promises to repair the same, he impliedly requests the servant to continue to work, and that he, the master, will take upon himself the responsibility of any accident that may occur during that period."

The words "that period," in the above quotation, refer to a reasonable time for the performance of the master's promise. The contention that appellee's injury was the result of a mere accident, can not be sustained.

Appellant's instruction 4 was properly refused. Instruction 9, asked by appellant, is substantially covered by appellant's instruction 2, given. We find no reversible error in the refusal or modification of any instruction asked by appellant. The court gave numerous instructions for appellant, which, taken together, fairly embody the law applicable to the facts in evidence. Neither do we

find any reversible error in the court's ruling on evidence. Appellee lost his left eye by an accident; he was unable to work for nearly a year, and suffered a great deal of pain, and we can not say that the damages awarded by the jury were excessive.

The judgment will be affirmed.

---

105 267
a206s 124

Supreme Tent of the Knights of the Maccabees of the World v. Minnie M. Stensland et al.

1. INSURANCE—*Where Member of Beneficiary Order Contracts that He Will Be Bound by the Laws of the Order Which Might Afterward be Enacted.*—Where a member of a beneficiary order contracts that he will be bound by the laws of the order which might afterward be enacted, not only he, but also his beneficiary, is bound thereby.

2. SAME—*Prima Facie Case in Suit on a Benefit Certificate.*—The plaintiff makes a *prima facie* case on a benefit certificate when he has put in evidence the benefit certificate and proofs of death, has showed who the beneficiaries are, and proved that the assured had died before the suit was begun. It is not incumbent upon plaintiff to show that the deceased had complied with the rules of the order. If defendant claims that there has been a failure to comply with such rules, it is bound to prove the same as a matter of defense.

3. PRACTICE—*When Defendant Rests His Defense upon a Fact Which is Not Included in the Allegations Necessary to Support the Plaintiff's Case.*—When a defendant intends to rest his defense upon a fact which is not included in the allegations necessary to support the plaintiff's case, he must set it up in precise terms in the answer.

4. EVIDENCE—*Burden of Proof on Defendant to Meet a Prima Facie Case.*—The burden of sustaining an affirmative defense to a *prima facie* case made by the plaintiff does not shift during the trial, but obligates the defendant to prove such defense by a preponderance of the evidence.

5. ESTOPPEL—*By Statements as to Cause of Death in Proofs of Death.*—The statements as to the cause of death, as set forth in the proof of death, do not estop plaintiff from showing, if he can, that the deceased did not commit suicide by strangulation.

6. JURY—*Province to Decide upon Credibility of Witnesses.*—It is the province of the jury and not of the court, to decide in the first instance, upon the credibility of the witnesses and the weight to be given to their respective statements.

Assumpsit, on a benefit certificate. Appeal from the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge presiding. Heard in this court at the March term, 1902. Affirmed. Opinion filed December 22, 1902.

March 20, 1895, appellant issued a benefit certificate to Peter A. Stensland. At that time the by-laws provided that if the assured committed suicide, sane or insane, within one year after the date of the certificate, no benefit should be paid. In 1897 this by-law was changed by extending the time to five years, and in case of suicide within that time appellant should be liable only for the amount of all assessments paid. April 2, 1898, the assured was found dead in his home. The circumstances strongly tended to show that he had committed suicide. The coroner's jury returned a verdict of "suicide by strangulation." The proofs of death, which were signed by appellees, stated that the cause of death was suicide by strangulation. Appellant refused to pay anything more than the amount of the premiums it had received. Thereupon suit was brought upon the certificate. Appellant interposed a plea of the general issue, and a special plea setting up that the deceased had committed suicide, and conceding that judgment should be entered against it for the amount of the paid assessments.

On the trial appellees showed the death of assured, and introduced the certificate and proofs of death; while appellant offered in evidence the by-laws in force during the time the deceased was a member. Then appellees put in testimony tending to show that the deceased did not commit suicide and appellant rebutted with evidence tending to show that he did.

The jury found specially that the deceased did not come to his death by committing suicide with suicidal intent, and also brought in a general verdict for appellees and assessed their damages at the sum of $2,000. From the judgment based upon that general verdict, this appeal was perfected.

H. H. C. MILLER and W. S. OPPENHEIM, attorneys for appellant.

BEACH & BEACH, attorneys for appellees.

MR. PRESIDING JUSTICE BALL delivered the opinion of the court.

First. The benefit certificate provided that the assured should comply with "the laws of the order now in force or that may hereafter be adopted." When this certificate was issued to the deceased a by-law of appellant declared that if a member committed suicide within one year after his admission to the order, sane or insane, the certificate should be void. Afterward, and before his death, this by-law was changed by striking out the words "one year," and by inserting in lieu thereof the words "five years." The assured died within five years next after he became a member of this order. Where a member of a beneficiary order contracts that he will be bound by the by-laws of the order which might afterward be enacted, not only he, but also his beneficiary, is bound thereby. Supreme Tent, etc., v. Hammers, 81 Ill. App. 560, 567.

Second. The burden of proof on the issue of suicide as raised by the special plea was on appellant. Such a defense is an affirmative one. It is substantially matter in confession and avoidance, and should be pleaded.

"When a defendant intends to rest his defense upon a fact which is not included in the allegations necessary to support the plaintiff's case, he must set it out in precise terms in the answer." Coburn v. Traveler's I. Co., 145 Mass. 226.

The appellees made a *prima facie* case when they had put in evidence the benefit certificate and proofs of death, showed who the beneficiaries were, and proved that the assured had died before the suit was begun. It was not incumbent upon appellees to show that the deceased had complied with the rules of the order. If appellant claimed there had been a failure to comply with such rules, it was bound to prove the same as a matter of defense. Supreme Lodge, etc., v. Matejowsky, 190 Ill. 142. This burden of proof being upon appellant, it did not shift during the trial, but obligated appellant to prove such defense by a

preponderance of the evidence. Egbers v. Egbers, 177 Ill. 82, 88.

Third. The statements as to the cause of death, as set forth in the proofs of death, do not estop appellees from showing, if they can, that the deceased did not commit suicide by strangulation.

In Pythias Knights S. L. v. Beck, 181 U. S. 49, the application for membership provided that "if death shall result by suicide, whether sane or insane," etc., then only a certain sum shall be paid on the certificate. The assured was killed by the discharge of a gun at the time held in his hands. The coroner's jury found that he committed suicide. The proofs of death furnished by his widow declared that his death was caused by "suicide." The widow sued to recover the full amount of the insurance. The answer alleged that the assured died from "self-destruction and suicide." The verdict and judgment were for the plaintiff. As to the question now under consideration, the Supreme Court say:

"With respect to this matter the (trial) court charged that there was no estoppel; that the plaintiff could explain the circumstances under which she signed the statement, and that while standing alone it would justify a verdict for the defendant, yet if explained and the jury were satisfied that the death did not arise from suicide, she was not concluded by this declaration. We see no error in this ruling. None of the elements of estoppel enter into the declaration. The condition of the defendant was not changed by it, and if under a misapprehension of the facts she made a statement which was not in fact true, she could explain the circumstances under which she made the statement and introduce testimony to establish the truth."

The widow of deceased testifies that Mr. Edwards, the record keeper of appellant, furnished the proofs of death; that the handwriting in the blanks was his, and that she signed the proofs without reading them or hearing them read.

Fourth. Tested by the principles herein set forth, neither of the instructions offered by appellant, and refused by the court, states the law correctly. The refusal to give them to the jury was not error.

Fifth. If this case had been submitted to us for trial, we might not have reached the same conclusion as did the jury; but it is the province of the jury, and not of this court, to decide, in the first instance, upon the credibility of the witnesses and the weight of their respective statements. (Lake Shore & M. S. Ry. Co. v. Foster, 74 Ill. App. 397.) An examination of the record convinces us that there is evidence which, if believed by the jury, fairly tends to support the verdict. The trial judge stands charged with full responsibility to see that a verdict manifestly and clearly against the evidence should be set aside and a new trial granted. He had the same opportunity for seeing the witnesses, for noting all those matters in a trial not capable of record, as had the jury, and when he sustains the action of the jury we must pay large respect to his judgment. In this case the trial judge, after argument, overruled the motion for a new trial, and entered judgment upon the verdict. We can not say that the verdict is so clearly and manifestly against the weight of the evidence that we should, for that reason, reverse this judgment.

The judgment of the Circuit Court is affirmed.

---

105 271
a208s 544

Harmon L. Parmelee et al. v. Vincent C. Price et al.

1. STATUTE OF LIMITATIONS—*Equity Follows the Law.*—Where a bill in equity states a case within the statute of limitations at law, the objection may be raised by demurrer to the bill. In such cases equity follows the law by analogy.

2. SAME—*A Statute of Repose.*—The statute of limitation is a statute of repose. It is intended for the protection of the alleged debtor, against demands brought forward after so long a time from the transaction involved, that evidence formerly within the power of the defendant to produce may have been lost, destroyed, or otherwise placed beyond his power or control.

3. SAME—*Where a Person Liable to an Action Fraudulently Conceals the Cause of Such Action from the Knowledge of the Person Entitled Thereto.*—If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the

action may be commenced at any time within five years after the person entitled to bring the same discovers that he has such cause of action, and not afterward.

4. STATUTES—*Who May File Bill under Section 25 of the Corporation Act.*—Section 25 of the corporation act provides a remedy in the nature of a creditor's bill, and is designed to aid creditors in the collection of their debts. It is not restricted to judgment creditors.

5. SAME—*Liability of Stockholders under Section 25 of the Corporation Act.*—Section 25 of the corporation act clearly authorizes the bringing of a suit in equity against a corporation and its stockholders jointly, upon the corporation ceasing to do business, leaving debts unpaid. It clearly contemplates liability of the stockholders, for the purpose of bringing suit against them, immediately on the company ceasing to do business, leaving debts unpaid.

6. SAME—*Application of Term, "After Exhausting the Assets of the Corporation" in Section 25 of the Corporation Act.*—The exhaustion of the assets of the corporation is not a condition precedent to the bringing of a suit against the corporation and its stockholders jointly, because section 25 expressly authorizes such suit, and the exhaustion of the assets of the corporation is not made a condition precedent thereto. A stockholder is entitled to have the corporate assets, in possession of the corporation, applied to the payment of the corporation debts, before, in a suit against him and the corporation jointly, he can be decreed to pay anything. The meaning of the language is that in such a suit it must be ascertained, in the first instance, how far the corporate assets, if any, will go toward paying the claims of the complainant or complainants, which may be done by ordering a sale of such assets, when, if the proceeds of the sale are not sufficient to pay the claims, the defendant stockholders may be decreed to pay the deficit.

7. PRACTICE—*When the Statute of Limitation Begins to Run, Where Two Remedies for the Same Relief Accrue at Different Times.*—When there are two remedies, pursuing either of which a party may have the same relief, and the rights to the two remedies accrue at different times, the statute begins to run from the time when the right to pursue the earlier remedy accrues.

Creditor's Bill.—Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge presiding. Heard in this court at the March term, 1902. Affirmed. Opinion filed December 22, 1902.

Statement.—This is an appeal from a decree sustaining a demurrer to a bill and dismissing the bill. The bill is a creditor's bill, and was filed by appellants, May 25, 1901, and was amended December 11, 1901; the demurrer sustained by the court is to the amended bill. The defendants to the bill are the Interior Building Company, a corporation, and

Vincent C. Price and Henry F. Vehmeyer, stockholders in said defendant company. Henry F. Vehmeyer demurred, generally, to the bill; Vincent C. Price demurred, assigning as cause for his demurrer, first, that it appears from the bill that the cause of action, if any, accrued prior to May 23, 1895, and is barred by section 15, chapter 83 of the statute of limitations; second, laches, etc. The bill sets up judgments recovered in the Circuit and Superior Courts of Cook County, as shown by the following table:

Name.	Term.	Court.	Date.	Amount.
Parmalee & Stoneman	Dec. 1896	Circuit	Jan. 7, 1897	$ 908 52
The Columbia Hardwood Lumber Company	Nov. 1896	Superior	Nov. 11, 1896	1,075 76
S. K. Martin Lumber Company	Mar. 1897	Circuit	Apr. 12, 1897	1,901 90
Tyler & Hippach	Dec. 1896	Circuit	Jan. 7, 1897	348 83
Lesh, Sanders and Egbert, Company	Feb. 1897	Circuit	Feb. 24, 1897	2,280 02
The Martin-Barriss Company	Feb. 1896	Circuit	Mar. 9, 1896	464 50
Penrod & Wood	Feb. 1897	Circuit	Feb. 24, 1897	1,378 80

And avers that the same remain in full force and wholly unsatisfied; also that executions were issued on the judgments and were delivered to the sheriff, and by him returned, as shown by the following table:

Judgment of.	Date of issue.	Date of indorsement and delivery to sheriff.	Date of return.	Date of filing.
Parmalee & Stoneman	May 4, 1901	May 24, 1901	May 24, 1901	May 24, 1901
The Columbia Hardwood Lumber Co.	May 6, 1901	May 24, 1901	May 24, 1901	May 24, 1901
S. K. Martin Lumber Co.	Apr. 14, 1897	Apr. 15, 1897	July 13, 1897	July 15, 1897
35 Tyler & Hippach	Jan. 9, 1897	Jan. 20, 1897	Apr. 9, 1897	Apr. 30, 1897
Lesh, Sanders and Egbert Co.	Mar. 1, 1897	Mar. 2, 1897	May 30, 1897	June 1, 1897
The Martin-Barriss Company	June 5, 1901	June 5, 1901	June 6, 1901	June 7, 1901
Penrod & Wood.	Mar. 1, 1897	Mar. 2, 1897	May 30, 1897	June 1, 1897

Also, that alias writs of execution were sued out by some of the complainants, delivered to the sheriff and by him returned, as shown by the following table:

Judgment of.	Date of issue.	Date of indorsement and delivery to sheriff.	Date of return.	Date of filing.
S. K. Martin Lumber Co.....	May 10, 1901	May 24, 1901	May 24, 1901	May 24, 1901
Tyler & Hippach.	May 13, 1901	May 24, 1901	May 24, 1901	May 24, 1901
Lesh, Sanders and Egbert Co.....	May 10, 1901	May 24, 1901	May 24, 1901	May 24, 1901
Penrod & Wood..	May 10, 1901	May 24, 1901	May 24, 1901	May 24, 1901

That the return of each of said executions issued on the judgments of the S. K. Martin Lumber Co., Tyler & Hippach, Lesh, Sanders and Egbert Co., and Penrod & Wood, appellants, was as follows:

"The within named defendant not found and no property of the within named defendant found in my county on which to levy this writ. I therefore return the same, no property found and no part satisfied this.....day of..... 1897;"

and the return of the execution issued on the judgment of the Columbia Hardwood Lumber Co. and on the alias executions issued on the judgments of S. K. Martin Lumber Co., Tyler & Hippach, Lesh, Sanders and Egbert Co., and Penrod & Wood, were as follows:

"I have demanded of the within named defendant Interior Building Company, a corporation, by its president, Vincent C. Price, the 24th day of May, 1901, money or property to satisfy this writ, and it having failed to satisfy the same or any part thereof, and not being able to find any property of the within named defendant in my county on which to levy this writ, I therefore return the same, no property found and no part satisfied, this 24th day of May, 1901.

ERNEST J. MAGERSTADT, Sheriff,
By SAMUEL E. ERICKSON, Deputy;"

and the return of the execution issued on the judgment of the Martin-Barriss Co. was as follows:

"I have demanded of the within named defendant, Interior Building Company, a corporation, by its president, Vincent C. Price, the 6th day of June, 1901, money or property to satisfy this writ, and it having failed to satisfy the same or any part thereof, and not being able to find any property of the within named defendant in my county on which to levy this writ, I therefore return the same, no

property found and no part satisfied, this 6th day of June, 1901. ERNEST J. MAGERSTADT, Sheriff,
By SAMUEL E. ERICKSON, Deputy;"

that the suits in which said judgments were recovered were commenced between and including May 16th and 25th, 1895, and were prosecuted with due diligence, etc.; that May 16, 1895, a judgment by confession was rendered in the Circuit Court of Cook County in favor of the Lincoln National Bank of Chicago and against said Interior Building Co. for the sum of $20,065 and costs, on which judgment an execution was issued and levied on all the tangible property and effects of said company. It is then averred as follows:

"That on the 16th, 17th, 18th and 23d days of May, 1895, numerous assumpsit and attachment suits were commenced against said company and levies made on its property and effects; that on May 17, 1895, two bills were filed against said company by certain of its creditors, in the Circuit Court of said county, being general numbers 142,991 and 142,992 of said court, to which then or subsequently all its stockholders and stock subscribers were made parties defendant; which causes were afterward consolidated, and on May 20, 1895, a receiver was appointed of the property, things in action and effects of said company, and all its property, things in action and effects were afterward collected by him and applied, under the direction of said court by the final decree entered in said consolidated causes, by consent of all the parties thereto, on October 31, 1899, after the payment of the expenses of said receivership, to the payment *pro tanto* of the judgment of said bank; but that no decree was ever entered in said consolidated causes dissolving said Interior Building Company and winding up its affairs, or finding any of the parties thereto liable on account of their subscriptions to the capital stock of said company; but, on the contrary, with respect to the allegations in the amended bill of complaint in said consolidated causes, of such liability, and generally, said bill was dismissed, by agreement of all the parties thereto, by said consent decree, and a reference to a master in chancery of said court of the issues raised on such allegations and the other issues in said consolidated causes, aside from questions arising with respect to the administration of the estate of said company by said receiver, by like agreement of the parties thereto,

was, by said consent decree, set aside; and your orators further represent that they were not parties to said consolidated causes, nor in any manner bound or precluded by any of the proceedings therein;"

that the Martin-Barriss Co. had no knowledge of said last mentioned bills or the proceedings therein until May, 1901; that on October 31, 1899, the Interior Building Company was, and has since remained, hopelessly and irretrievably insolvent. The bill then sets out the articles of incorporation of the defendant company, which show that a certificate of complete organization of said company was issued June 2, 1890; that the object of its incorporation was "for manufacturing the interior woodwork for private and public buildings, and all woodwork pertaining to the same;" that its capital stock was $125,000, divided into 1,250 shares of $100 each, and the location of its principal office the city of Chicago, and that its stock was subscribed for as follows:

"Names.	Shares.	Amount.
Vincent C. Price,	480	48,000
Henry F. Vehmeyer,	320	32,000
C. Augustus Ebert,	300	30,000
R. C. Price,	100	10,000
G. K. Williams,	50	5,000."

It is averred, in substance, that in April, 1890, one James B. Goodman, the assignee of an insolvent estate then pending in the County Court of Cook County, owned and possessed certain buildings, machinery, equipments, etc., and had, for many months, been endeavoring to sell and dispose of the same, under the orders of said court, and that the above mentioned subscribers for stock formed the design of buying and operating said "plant," and, for the purpose of avoiding liability as partners, to form a corporation, with a capital of $125,000, regardless of the actual amount paid on the subscriptions for stock; and designed to expend in the formation of said corporation only the amount actually necessary to purchase said plant and begin operations; that at or about the time of forming said corporation, and in pursuance of said design, said plant was purchased from

said Goodman for the sum of $25,000, which sum was furnished by said stock subscribers in the proportion of their said subscriptions, and was turned over to the Interior Building Co., and the further sum of $25,000 was paid by said subscribers to said company, in the proportion of their said subscriptions, and the entire capital stock of said company was issued to said subscribers, in the amounts subscribed for by them, as fully paid stock, and that no money or thing of value, in addition to the said plant purchased for $25,000, and $25,000 in cash, was ever paid on account of said subscriptions of $125,000; that, by reason of the premises, Price and Vehmeyer have paid only two-fifths of the amounts of their subscriptions, and are liable for the debts of the defendant company, and for the amounts due on said judgments, to the extent of the amounts unpaid on their subscriptions, etc. The bill prays an accounting and that defendants be decreed to pay, etc., and for general relief.

CORBIN & ZILLMAN, attorney for appellants.

JAMES FRAKE, attorney for appellee Henry F. Vehmeyer.

FLOWER, VROMAN & MUSGRAVE, attorneys for appellee V. C. Price.

MR. JUSTICE ADAMS delivered the opinion of the court.

The only questions argued by counsel are whether section 15 of chapter 83 of the statute which limits actions therein mentioned to five years, applies, and whether the complainants are guilty of laches. The contention of appellee is that, it appearing by the bill that May 20, 1895, a receiver of all the assets and effects of the Interior Building Co. was appointed on bills filed by creditors of the company, and that the said assets and effects were, by the receiver and under the final decree of the court, entered October 31 1899, applied to the judgment of the Lincoln National Bank of Chicago, after payment of the expenses of the receivership, etc., and all the assets of the company having been in the possession of the receiver from the time of his

appointment, May 20, 1895, until the final decree, October 31, 1899, or more than four years, it sufficiently appears that the defendant company had ceased doing business, leaving debts unpaid, and that, when the company ceased doing business, leaving debts unpaid, namely, May 20, 1895, appellants' right of action accrued under section 25 of the corporation act, and, consequently, their bill filed May 25, 1901, was too late; that appellants having failed to file a bill in apt time, under said section 25, can not sustain their bill, as a creditor's bill, under section 49 of the chancery act. If the bill states a case within the statute of limitations, at law, the objection may be raised by demurrer to the bill (Story's Eq. Pl., 9th Ed., Sec. 484), and in such case equity follows the law, by analogy. Ib.; Angell on Limitations, Sec. 25 *et sequens;* School Directors v. School Directors, 105 Ill. 653.

It is contended by counsel for appellants that only judgment creditors can maintain a bill under section 25.

In Butler Paper Co. v. Robbins et al., 151 Ill. 588, the Butler Paper Company filed a bill under section 25 of the corporation act. The company was a simple contract creditor and it was contended by counsel for one of the defendants that the company, being a simple contract creditor, could not maintain the bill. Green's Brief for Tenney, Ib. 593. In respect to this objection the court say:

"It is insisted that there was a want of jurisdiction in the Circuit Court to entertain the complainant's bill. We think this objection is not well taken. The printing company was incorporated under the general act of April 18, 1872, and had ceased doing business, leaving debts unpaid, and complainant was one of its creditors and stockholders, and, under section 25 of said act, had the right, we think, to file this bill. In Hunt v. LeGrand Roller Skating Rink Co., 143 Ill. 118, the court said: 'It is provided in said section that suits in equity may be brought against a corporation and its stockholders, and all persons liable in any way for the debts of said corporation, but it is not stated, in express terms, by whom such suits in equity may be prosecuted. It is manifest, however, that the statute provides a remedy in the nature of a creditor's bill, and is designed to aid credit-

ors in the collection of their debts.'" See, also, Cohn v. F. S. Waters & Co., 83 Ill. App. 387.

It follows, therefore, that appellants might, under section 25 of the corporation act, have filed a bill about May 20, 1895, when the defendant company ceased doing business, leaving debts unpaid, although their respective claims had not then been reduced to judgments, and on such bill they would have had a remedy against all the stockholders, including those made defendants to the present bill. Appellants' counsel contends that the liability of the stockholders did not accrue at the time the company ceased doing business, leaving debts unpaid. We think the question solved by section 25, which provides:

"If any corporation or its authorized agents shall do, or refrain from doing, any act which shall subject it to a forfeiture of its charter or corporate powers, or shall allow any execution or decree of any court of record for a payment of money, after demand made by the officer, to be returned 'no property found,' or to remain unsatisfied for not less than ten days after such demand, or shall dissolve or cease doing business, leaving debts unpaid, suits in equity may be brought against all persons who were stockholders at the time, or liable in any way, for the debts of the corporation, by joining the corporation in such suit; and each stockholder may be required to pay his own *pro rata* share of such debts or liabilities, to the extent of the unpaid portion of his stock, after exhausting the assets of the corporation," etc.

The section clearly authorizes the bringing suits in equity against a corporation and its stockholders jointly, upon the corporation ceasing to do business, leaving debts unpaid. It clearly contemplates liability of the stockholders, for the purpose of bringing suit against them, immediately on the company ceasing to do business, leaving debts unpaid. Appellant's counsel, relying, apparently, on the words "after exhausting the assets of the corporation," contends that the exhausting of such assets is a condition precedent to the liability of the stockholders. It is clear, however, that the exhaustion of the assets of the corporation is not a condition precedent to the bringing suit against the corporation

and its stockholders jointly, because section 25 expressly authorizes such suit, and the exhaustion of the assets of the corporation is not made a condition precedent thereto. A stockholder is entitled to have the corporate assets, in possession of the corporation, applied to the payment of the corporate debts, before, in a suit against him and the corporation jointly, he can be decreed to pay anything, and the meaning of the language is that in such a suit it must be ascertained, in the first instance, how far the corporate assets, if any, will go toward paying the claims of the complainant or complainants; which may be done by ordering a sale of such assets, when, if the proceeds of the sale are not sufficient to pay the claims, the defendant stockholders may be decreed to pay the deficit, to the extent of their legal liability; and so the court, in Chicago Steel Works v. Ill. Steel Co., 153 Ill. 9, 15, cited by counsel, say:

"The collection and disposition of these assets, through the medium of a receivership, must necessarily precede the final determination of the liability of the stockholders."

This is a mere marshaling of assets.

In the present case it affirmatively appears by the bill that the Interior Building Co., after May 20, 1895, had not sufficient assets to pay the claim of the Lincoln National Bank; that its assets were exhausted. The averment is, in substance, that the company's assets, after payment of the expenses of the receivership, were applied to the payment *pro tanto*, of the judgment of said bank. But appellants' counsel contend that the bill is distinctly a creditor's bill under section 49 of the chancery act, and that appellants' right to file a bill did not accrue until after executions issued on their judgments had been returned unsatisfied, citing cases. But it seems to be the law that when there are two remedies, pursuing either of which a party may have the same relief, and the rights to the two remedies accrue at different times, the statute begins to run from the time when the right to pursue the earlier remedy accrues. Conklin v. Furman et al., 8 Abbott's Pr. Rep. N. S. 161, was an action against Furman and others, as stockholders

of the Newton & Hempstead Plank Road Co., commenced June 24, 1862. The statute limiting the action to six years was pleaded. The indebtedness in question in the case accrued due January 1, 1855, and a suit was commenced against the company and Furman and others, stockholders, June 1, 1855, but was dismissed as to the stockholders, and judgment was recovered against the company August 9, 1860. The statute of New York authorized a separate suit against stockholders for the debts of the corporation, but provided that such suit should not be brought until after judgment on the demand against the corporation, and so the separate action was not barred, if it was the only remedy. But, by another statute, suit might be brought against the corporation and any one or more of its stockholders, as soon as the indebtedness of the corporation accrued due, and the court held that the statute commenced to run when the debt sued for fell due, viz., January 1, 1855, and that as suit was not brought till June 24, 1862, it was barred by the statute. The judgment was affirmed on appeal. Conklin v. Furman, 48 N. Y. 527.

A similar decision was rendered in Cottrell v. Manlove, 58 Kansas, 405.

As far as creditors of a corporation are concerned, the object of section 25 of the corporation act and section 49 of the chancery act, is the same, namely, to aid creditors in the collection of their debts. Butler Paper Co. v. Robbins et al., 151 Ill. 621, and cases cited.

The statute of limitation is a statute of repose. It is intended for the protection of the alleged debtor, against demands brought forward after so long a time from the transaction involved, that evidence formerly within the power of the defendant to produce may have been lost, destroyed or otherwise placed beyond his power or control; and it seems reasonable that the statute should commence to run from the time when the plaintiff had a remedy, pursuing which he could have had all the relief which he was entitled to. The bill alleges that May 20, 1895, a receiver "of the property, things in action and effects of the com-

pany" was appointed, on the former bills against the Interior Building Co. and its stockholders, etc., and, as against the pleader, it must be presumed that the receiver, as soon as practicable, took possession of such property, things in action and effects; and it is apparent that, after the appointment of the receiver, the Interior Building Co., having no property or effects which it could use in carrying on its business, must have ceased to do business; and that it left debts unpaid is sufficiently manifest from the bill. The complainants not having filed their original bill until May 25, 1901, six years after the time when they might have proceeded under section 25 of the corporation act, and have obtained, if entitled thereto, the same relief which they now seek, we must hold that their bill is barred by the statute.

The appellant, the Martin Barris Co., was made a party complainant June 10, 1901, and it is averred in the bill that that company had no knowledge of the former bills, or the proceedings thereunder, until May, 1901. This is no answer to the defense of the statute of limitations. Section 22 of the statute provides:

"If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within five years after the person entitled to bring the same discovers that he has such cause of action, and not afterward."

This is the only provision in the statute excusing strict compliance with its terms, on account of want of knowledge, and impliedly excludes want of knowledge arising from any other cause than the fraudulent concealment mentioned, as an excuse for not bringing suit within the time limited by the statute. See, also, Connor v. Goodman, 104 Ill. 366.

The decree will be affirmed.

Ætna Insurance Company et al. v. Abraham Jacobson et al.

1. FORFEITURES—*Burden of Proof upon One Claiming.*—Forfeitures are not favored by the law. The burden is on him who claims the benefit of a forfeiture to clearly establish his right.

2. MORTGAGES—*Execution Not a Change of Title.*—The execution of a mortgage upon insured property is not a violation of the covenant against a change of title.

3. DEEDS—*May be Shown to be Mortgages.*—A deed absolute in form, may be shown by parol to be a security only, if such be the fact.

4. INSURANCE—*Acts Constituting a Waiver of the Condition Requiring Proof of Loss.*—A distinct denial of liability, and refusal to pay on the ground that there is no liability, is a waiver of the condition requiring proof of loss.

5. EQUITY PRACTICE—*Due Weight Should be Given to the Conclusion of the Master.*—Due weight should be given to the conclusion of the master when the witnesses were before him, because of the advantage which he derives from seeing them and judging of their credibility.

6. SAME—*Where Finding of the Master Has Been Approved by the Chancellor.*—Where the finding of the master has been approved by the chancellor, an appellate tribunal will not disturb the finding unless the weight of the evidence is manifestly and clearly against the finding.

Bill to Foreclose a Trust Deed.—Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge presiding. Heard in this court at the March term, 1902. Affirmed. Opinion filed December 22, 1902.

Action to foreclose a trust deed.

As to the rights of the original complainants, the holder of the indebtedness and the trustee in the trust deed, there is no contention. It is admitted that they are entitled to the relief prayed for, and that the rights of all other parties herein are subordinate.

The contention upon this record is between appellants and the appellees Jacobson and Bernstein. Jacobson owned the premises subject to said trust deed. On August 20, 1897, two policies of insurance were issued to the owner of the premises, Jacobson; one by the Ætna Insurance Company, and the other by the London & Lancaster and the Norwalk, under the joint title of "English and American

Underwriters." Each policy was for the sum of $1,500, and each had attached thereto a mortgage clause which provided that the loss, if any, should be payable to the trustee named in said trust deed. It was provided in each policy that the same should be void as to the insured "if any change other than by death of an insured take place in the interest, title or possession of the subject of insurance, or if this policy be assigned before loss." It was further provided that in case of loss, the insured should file proofs of loss with the company within sixty days after the fire.

November 20, 1899, Jacobson executed and delivered to Henry Bernstein a quit-claim deed of the premises. February 4, 1900, the premises were injured by fire. Negotiations between the trustee and the companies began and were carried on until June 9, 1900, when the trustee filed proofs of loss, claiming damages in the sum of $942, which the companies paid to him as the agreed loss. Neither Bernstein nor Jacobson filed separate proofs of loss.

The trustee and the owner of the indebtedness began a foreclosure upon such trust deed. The companies answered, and then filed a cross-bill, in which they alleged that by reason of the transfer of the title to the premises and the failure to file proofs of loss, the policies became void, and that by reason of the payment to the trustee they became entitled to subrogation to the amount of such payment. Bernstein answered the cross-bill, setting up an indebtedness of Jacobson to him, and that the quit-claim deed, although in form an absolute conveyance, was in fact a mortgage; that the trustee in making such proofs of loss had acted as the agent of the assured, and that the companies were not entitled to be subrogated. Jacobson also filed an answer identical in every particular to that of Bernstein. Certain intervening petitions for mechanics' liens were filed. The evidence tended to prove that Bernstein, as owner, had contracted with one Scheresewsky to repair the premises for $1,050, and that it was agreed between these two that the compensation therefor should be

but $750. This latter amount was finally agreed upon by all parties as due under such mechanics' liens.

In this condition of the pleadings the cause was referred to a master, proofs taken and master's report filed and exceptions thereto argued. The report of the master, after finding the amount due under the trust deed as a first lien upon said premises, found that the quit-claim deed from Jacobson to Bernstein was not intended as an absolute conveyance, but was intended to be, and hence is, in fact, a mortgage; that the assignment of the policies was not made an issue in the cross-bill as it then stood, and therefore that question is immaterial; and that by the failure of Jacobson to file proofs of loss within the time required by the policies, he had forfeited his rights thereunder. The report then found that the companies were entitled to be subrogated to the rights of the holder of the indebtedness to the extent of the moneys paid by them, subject, however, to the remainder of such indebtedness, but superior to the rights of any other parties to the suit; that the lien claimants came next, to an amount not exceeding in the aggregate $750; and that Henry Bernstein was entitled to a lien on said premises for $881.07.

Afterward the cause was re-referred to the master to take such further evidence, if any, as he might think best, and to report again. Appellees amended their answer to the amended cross-bill by alleging that within ten days after the happening of the fire, appellants, and each of them, denied liability upon said policies to Abraham Jacobson or to his duly authorized agent, on the ground that the premises had been previously conveyed by Jacobson to Bernstein. Upon this reference further evidence was taken by both appellants and appellees, and a supplemental report was filed by the master.

This supplemental report, after affirming the conclusions reached in the prior report, found that the denial of liability by the companies upon the ground that Jacobson conveyed to Henry Bernstein not only came to the knowledge of Jacobson's agent, but came to the knowledge of

Jacobson within the period of time allowed by the policies for filing proofs of loss; and holds that appellants, by denial of liability, waived the provisions of the policies requiring proofs of loss to be filed, and that said policies were not forfeited by the failure of Jacobson to comply therewith. It also holds that the assignment of the policies was not made until after the loss had accrued. The report ends as follows:

"I therefore reach the following conclusions: First, that the quit-claim deed in question was a mortgage and not an absolute conveyance; second, proofs of loss were waived by the companies so that the policies have not been forfeited because of Jacobson's failure to file them; third, that there has been no violation of the policies concerning assignments thereof. I recommend that the cross-bill be dismissed."

Exceptions were filed to this report. The court, after hearing counsel, overruled the exceptions and entered a decree conforming to the master's report. From that decree this appeal was perfected, by which appellants seek a reversal thereof so far as the same orders the dismissal of their cross-bill and denies them the relief sought therein.

RITSHER, MONTGOMERY & HART, attorneys for appellants.

BLUM & BLUM, attorneys for appellees.

MR. PRESIDING JUSTICE BALL delivered the opinion of the court.

Appellants contend that by the assignment of the policies Jacobson forfeited all rights thereunder. Forfeitures are not favored in the law. The burden is on him who claims the benefit of a forfeiture to clearly establish his right. The witness Kuhl, an employe of the holder of the trust deed indebtedness, who was called by appellants, and whose testimony stands uncontradicted, testifies that after the fire he took the policies to the office of Mr. Blum, and there the assignments were written upon the back of them; that he then carried them to the companies and asked them to consent to the assignments, which they refused to do.

Each of the policies provides that it shall be void "if this policy be assigned before a loss." Here is no ground of forfeiture. The contention in this regard can not be sustained.

Appellants further assert that the making of the quit-claim deed from Jacobson to Bernstein rendered the policies void. Each policy provides that it shall be void "if any change otherwise than by death of an insured take place in the interest, title or possession of the subject of insurance." The question then arises, is this instrument a deed, or was it intended as a mortgage? The execution of a mortgage upon insured property is not a violation of the covenant against a change of title. A deed absolute in form, may be shown by parol to be a security only, if such be the fact. The intention of the parties governs. German Ins. Co. v. Gibe, 162 Ill. 251.

Appellants declare that in order to show that an instrument, a deed in form, is a mortgage in fact, the proof must be clear and convincing. The authorities cited to sustain this proposition are contests between grantor and grantee. It is doubtful if that rule applies to cases like the one at bar, where the question is mooted with a third party, and where, if defeated, both grantor and grantee lose substantial rights. Without, however, passing upon that question, we call attention to the fact that the direct evidence in the record tends strongly to prove that the deed was in fact a mortgage. Appellant Bernstein produced a note signed by Jacobson, which indicates a prior indebtedness from the latter to the former. Bernstein never took possession of the premises. After he received the deed, interest was paid to him upon the alleged indebtedness. On the other hand, after the premises were damaged by fire, Bernstein, in his own name, entered into a contract for the repair of the building; and there was an attempt by some one, presumably Jacobson, to assign the policies to Bernstein. A careful examination of the record convinces us that it contains sufficient evidence, if believed, to justify the master in his conclusion that this quit-claim deed, in fact and in equity, was a mortgage.

Appellants also contend that they are not liable upon these policies, because appellees filed no proofs of loss. Proofs of loss were filed by the trustee and accepted by the companies. Unless the duty of filing such proofs upon the part of appellees was waived by the acts or words of appellants, the right of Jacobson to recover upon the policies was lost. It is claimed by appellees that there is abundant evidence showing that appellants, within a few days after the loss, denied liability upon the policies to Abraham Bernstein, the agent of appellee Jacobson. A distinct denial of liability, and refusal to pay on the ground that there is no liability, is a waiver of the condition requiring proof of loss. May on Ins., Sec. 469.

It appears from the evidence that appellants learned of the existence of the quit-claim deed immediately after the fire, and within a very few days thereafter denied liability upon that ground in a conference with the trustee and Abraham Bernstein. The witness Williams, called by appellees, who represented the Ætna Insurance Co., says that Abraham Bernstein said that he represented appellee Jacobson. But Williams did not represent the other appellant. Abraham Bernstein says that the wife of Jacobson, as soon as the loss occurred, wrote to her husband in Silverton, Colorado, and that the latter wrote to the witness to represent him and to settle the loss. This letter is not produced. It could not have been received by February 8th, when the second interview between him and the appellants is said to have been had. Nothing was said about such a letter until after the first report of the master was announced, in which Jacobson was held to have forfeited his rights under the policies because of his failure to file proofs of loss, it not appearing that the denial of liability by the companies was brought either to his knowledge or to the knowledge of any one acting for him. But Bernstein did produce a letter, which is in evidence, from himself to appellee Jacobson, dated February 12th, in which he acknowledges the receipt of a letter from appellee authorizing the witness to see the insurance companies and to settle the loss.

There is much in this record that tends to discredit the witness Abraham Bernstein, and to throw doubt upon his assertion that he represented Jacobson at any time when the companies denied liability in his presence. The conflict upon this question is direct, and this is especially true as to the alleged denial by the English and American Underwriters. But even if we might have reached a different conclusion had the matter been submitted to us *in limine*, we can not reverse upon that ground alone, where the evidence fairly tends to establish a different conclusion which was reached by the master and concurred in by the chancellor.

"The witnesses were before the master and heard by him, and when such is the case, due weight should be given, because of the advantage the master derived from seeing the witnesses, in judging of their credibility." Hubbard v. Hubbard, 79 Ill. App. 217, and cases cited.

Where the finding of the master has been approved by the chancellor, an appellate tribunal will not disturb the finding, unless the weight of the evidence is manifestly and clearly against the finding. Siegel v. Andrews & Co., 181 Ill. 356.

Finding no reversible error in the record, we affirm the decree of the Superior Court.

Board of Trade of the City of Chicago et al. v. Portus B. Weare et al.

1. INJUNCTIONS—*Issued Without Notice—Right of Objection.*—It can not be objected that an injunction order was entered without notice, where the defendant had a hearing on the motion to dissolve the injunction.

2. SAME—*Will Not Issue to Interfere with the Board of Trade While Regularly Engaged in an Investigation in Pursuance of Valid By-laws.*—The courts will not interfere by injunction, where the Board of Directors of the Board of Trade are engaged in investigating charges made in a complaint of a member in pursuance of valid by-laws, and it is not averred that the board is proceeding irregularly.

3. BY-LAWS—*Courts Will Not Interfere to Control Enforcement.*—The courts will never interfere to control the enforcement of by-laws of associations, the members of which join voluntarily and bind themselves to abide by the rules and regulations of the association, where such by-laws infringe no public policy or rule of law, and are not unreasonable.

4. PLEADING—*What a Motion to Dissolve an Injunction on the Ground of Insufficiency of the Bill Admits.*—A motion to dissolve an injunction on the ground of the insufficiency of the bill admits no more than would a demurrer to the bill, and a demurrer admits only such facts as are well pleaded, and necessarily such as existed prior to or at the time of filing the bill.

5. SAME—*Taken Most Strongly Against the Pleader.*—A pleading must be taken most strongly against the pleader.

Bill for an Injunction.—Appeal from an interlocutory order of the Superior Court of Cook County; the Hon. MARCUS KAVANAGH, Judge, presiding. Heard in this court at the October term, 1902. Reversed. Opinion filed December 11, 1902. Rehearing allowed December 22, 1902. Opinion refiled on rehearing, January 8, 1903.

Statement.—This is an appeal from an interlocutory order of injunction entered August 26, 1902, on a bill filed August 25, 1902, by the appellees against the appellants and others. The following facts are averred in the bill: The Weare Commission Company is an Illinois corporation, the object for which it was formed being, among other things, to engage in the commission business in all its branches, and Portus B. Weare is and for several years has been its president, and Charles A. Weare has been and is its secretary. The Board of Trade of the City of Chicago is a corporation organized under the law of Illinois. A copy of its charter and by-laws are annexed to and made a part of the bill. William S. Warren is president and George F. Stone is secretary of said board. Portus B. Weare, Charles A. Weare and Charles G. McNeil are members of said board of trade, and have been such, respectively, the first for thirty-five, the second for more than ten, and the last for about three years last past. It is averred, on information and belief, that the McNeil Grain Company was organized under the laws of Iowa, for the purpose of dealing in grain, provisions, stocks, bonds and

other securities and commodities, and that it has been engaged in business for more than three years last past, during which time McNeil has acted as its president and W. J. Flanigan as its secretary and treasurer. Complainants have been informed and believe that the capital stock of the said McNeil Co. has been, since said organization, and is the property of McNeil, one share thereof, though McNeil's property, being in the name of said Flanigan, and that McNeil has had and has the complete control and management of said corporation. The McNeil Co. was doing business in Sioux City, Iowa, and, March 14, 1899, the Weare Commission Co. became its agent and correspondent at Chicago, Illinois, to purchase and sell grain, provisions, stocks, etc., and such business relations continued till July 17, 1902. On entering into said relation with the McNeil Co., the Weare Commission Co. established direct communication with the former company, for the transmission of orders, etc., by means of a private telegraph wire. During the time of the existence of said business relation between said companies, Benjamin C. Jolly was the bookkeeper and margin clerk of the Weare Commission Co., and it was Jolly's duty to require of all persons and corporations dealing with or through the Weare Company to deposit, and keep deposited, with said company enough money, as margins, to protect said company from loss in executing the orders of such persons and corporations. Said Jolly had no authority to permit McNeil, or the McNeil Co., to deal through the Weare Co. without having deposited sufficient margins to protect the latter company, nor had Jolly authority to purchase or sell, on his or the Weare Co.'s account, any grain, provisions, stocks, etc., and he was forbidden so to do. From March 14, 1899, till May 8, 1900, the McNeil Co. caused to be kept with the Weare Co. an account, known as the grain account, in which were entered all transactions between said companies pertaining to purchases and sales of grain, provisions, etc., and also another account, known as stock account, in which were entered all trans-

actions between said companies pertaining to sales and purchases of stocks, bonds, and other securities. The bill then proceeds to aver that, about March 1, 1900, McNeil and Jolly entered into a conspiracy to cheat and defraud the Weare Co. out of large sums of money, by means of purchases and sales of stocks through said company, with the purpose and intent that, in case such purchases or sales should result in profits, the same should be received by said McNeil and Jolly; but that, if they should result in losses, such losses should be borne by the Weare Co. Following the last averment it is averred that, in pursuance of said conspiracy, McNeil and Jolly caused to be sold through the Weare Co., ostensibly for the McNeil Co., but really on account of Jolly and McNeil, 100 shares of the common stock of the Federal Steel Co., about April 17, 1900, at $46.75 per share, and 100 shares of common stock of the American Sugar Refining Co., about March 30, 1900, at $99.75 per share. The bill then sets forth at large a copy of a letter headed, "Sioux City, Iowa, April 20, 1900," and addressed, "Before Christ Jolly, Esq.," the first paragraph of which is as follows: "Friend Ben: I am in receipt of yours of the 19th, and note your ideas to stand out for $35 on steel. If you know you are right, act accordingly. If we can manage to run up a bunch of profits so we can play the game with their money, we may get ourselves in position to make a nice wad; so go ahead and do as you please." This letter is signed, "Yours truly, Mc."

There was some correspondence between McNeil and the Weare Co., which we think it unimportant to refer to specifically.

The bill avers numerous transactions in sales and purchases of stocks, which it is averred were made by McNeil and Jolly, for their joint benefit, in pursuance of the alleged conspiracy, and without the deposit of any margins with the Weare Co.; that about June 26, 1902, the Weare Co. first discovered the alleged fraudulent transactions, caused an investigation of the company's books to

be made, and discovered, on such investigation, that said transactions of McNeil and Jolly had resulted in a loss to the Weare Co. of at least $27,000. It is further averred that, July 17, 1902, the Weare Co. caused to be closed out all open trades carried on by the company on behalf of the McNeil Co. in grain and provisions, and entered in the grain account, and that, at said date, had no deductions been made on account of the aforesaid losses of the company, there would have been due and payable from the Weare Co. to the McNeil Co. the sum of about $32,000; that Jolly is insolvent, and the McNeil Co. a non-resident of this state, and its financial condition such that the Weare Co. could not, by process of law, collect said losses from it, and that McNeil is also a non-resident of this state and judgment against him would be, as complainants are informed and believe, uncollectible; that McNeil and the McNeil Co. insist on payment by the Weare Co. to McNeil, or the McNeil Co., of said sum of $32,000, without any deduction on account of said losses; but the Weare Co. refuses to pay more than the amount of the difference between said sum and the Weare Co.'s said losses, which difference it has been and is ready and willing to pay, and offers to pay. July 22, 1902, the grand jury returned into the Criminal Court of Cook County an indictment against Jolly and McNeil charging, in due form, an unlawful conspiracy to cheat and defraud the Weare Commission Company, said indictment being based on the conspiracy heretofore mentioned, which indictment is pending. August 8, 1902, Charles G. McNeil presented to the president of the Board of Directors of the Board of Trade a complaint in the words and figures following, to wit:

CHICAGO, August 8, 1902.

To the President and Board of Directors of the Board of Trade of the City of Chicago:

GENTLEMEN: The undersigned hereby complains of Portus B. Weare and Charles A. Weare, president and secretary of the Weare Commission Company, and makes the following charges against them:

First. That said Portus B. Weare and Charles A.

Weare, or the corporation (the Weare Commission Company) of which they are officers, have been guilty of an act of bad faith in that on July 17, 1902, when ordered to transfer the open trades on contracts and balance of the McNeil Grain Company, of Sioux City, Iowa, a correspondent of the said Weare Commission Company, to the firm of Weare & Leland, of Chicago, the said Portus B. Weare and Charles A. Weare, or the corporation (the Weare Commission Company) of which they are officers, did, with their concurrence and under their direction, close upon the open market all trades of the said McNeil Grain Company, to the great loss and injury of said McNeil Grain Company and its customers, and further have withheld all funds deposited by said McNeil Grain Company with said Weare Commission Company as margins, amounting to the sum of more than $32,000 after all trades had been closed as above stated, to the great embarrassment of the said McNeil Grain Company and its customers.

Second. That the said Portus B. Weare and Charles A. Weare, or the corporation (the Weare Commission Company) of which they are officers, have been guilty of an attempt at extortion, in that they refuse to pay over to said McNeil Grain Company the balance due said McNeil Grain Company, $32,731.46, more or less, or to give to said McNeil Grain Company a statement of their account, and in order to intimidate the said McNeil Grain Company, said Portus B. Weare and the employes and agents of the said Weare Commission Company procured the indictment of the president of said McNeil Grain Company, in the Criminal Court of Cook County, on a criminal charge, of the nature of which the said president of the McNeil Grain Company has no knowledge, and of which he is not guilty.

Third. That the said Portus B Weare and Charles A. Weare, or the corporation (the Weare Commission Company) of which they are officers, have been guilty of dishonest conduct, in that, after charging back to the account of the McNeil Grain Company on July 8, 1902, a certain note for $7,000, signed by one J. H. Mellott, of Oto, Iowa, and dated June 3, 1902, which had previously been transferred by said McNeil Grain Company to said Weare Commission Company as margins, they, the said Portus P. Weare and Charles A. Weare, or the corporation (the Weare Commission Company) of which they are officers, did not return said note to said McNeil Grain Company, but have disposed of said note, and the same is now held by

the bank at Cedar Rapids, Iowa, and notice has been served on the indorsers, Cutting & Willett, of Oto, Iowa, that said bank will demand payment of note at maturity.

Fourth. That said Portus B. Weare and Charles A. Weare, or the corporation (the Weare Commission Company) of which they are officers, have been guilty of dishonest conduct in that they have, without justification, attempted to ruin the business and standing of the McNeil Grain Company, of Sioux City, Iowa, for the purpose of acquiring the said business for the said Weare Commission Company, and to drive the said McNeil Grain Company out of business as a competitor.

Respectfully,

CHARLES G. MCNEIL."

August 12, 1902, said complaint came on for hearing before the said board of directors, and the hearing was, by said board, postponed to August 19, 1902, at which last date said board commenced the hearing and have proceeded therewith from time to time, and is still so proceeding. The bill then avers that the determination of said complaint depends on the question whether the McNeil Co. is responsible for the aforesaid losses; that it is important that the question of such liability should be fully investigated and correctly determined, and that said losses should be allowed as a set-off in favor of the Weare Co., to the extent that the McNeil Grain Co. may be held liable therefor, and to that end that complainants may be afforded the means of securing the attendance of witnesses, and causing depositions to be taken, etc.; that the board of trade has no power, when sitting as a tribunal for the determination of a complaint against one of its members, for neglect to equitably and satisfactorily adjust and settle a business obligation, or for any misconduct or offense described in its rules and by-laws, to compel the attendance of witnesses, or to administer oaths to them, etc., and, for these reasons it is not within the power of said board of directors properly to determine said controversy. The bill contains the following averment:

"That, as your said orators are informed and believe, and so charge the fact to be, said board of directors of said board

of trade of the city of Chicago has repeatedly ruled that it has no jurisdiction to investigate controversies between members of said board of trade arising out of stock transactions, or any other transactions, other than those had upon said board of trade of the city of Chicago, and as a consequence, in case of a complaint by one member of said board of trade against another member of said board of trade, for a failure to pay over money alleged to be due upon transactions had upon said board of trade, said board of directors has not the power to, and will not investigate and determine whether the member so charged with failing to pay over money said to be due, has or has not any claim which, in law or in equity, could be set off against or applied in payment of the moneys so alleged to be due said complaining member; and so your orators say, that said board of directors of the board of trade of the city of Chicago, upon the hearing of said complaint of said Charles G. McNeil against your orators, Portus B. Weare and Charles G. Weare, can not and will not undertake to determine whether or not said McNeil Grain Company is or is not liable to your said orator, Weare Commission Company, on account of any of the stock transactions aforesaid, but that said board of directors will, if the prosecution of said complaint is proceeded with to a final determination, hold that your said orator, Weare Commission Company, is in default to said McNeil Grain Company on account of the said moneys so alleged to be due it on account of said grain transactions, and will suspend or discipline your said orators, Portus B. Weare and Charles A. Weare, on account of such default, by suspension, expulsion or otherwise, and that said suspension, if adjudged by said board of directors, will continue until said Weare Commission Company shall pay over to said McNeil Grain Company the amount so alleged to be due on account of said grain transactions."

It is further averred that all the stock transactions heretofore mentioned were, in law and in fact, the transactions of the McNeil Co., and that said company is liable, etc. Process and an accounting are prayed, and an injunction restraining McNeil from further prosecuting the said complaint before said board of directors, or appearing or causing any other person to appear before said board for said prosecution, or the giving testimony concerning the same, or instituting or causing to be instituted or prosecuted,

before said board, any other complaint against Portus B. and Charles A. Weare, or either of them, involving or rendering necessary or material the determination of the amount of money, if any, due from the Weare Co. to the McNeil Co. on account of the transactions heretofore mentioned, or involving any matters set forth in the bill. The bill also prayed a like sweeping injunction against the board of trade, its officers and directors, enjoining them from the further hearing of said complaint of McNeil, etc.

The bill was verified by affidavit, which also stated that the rights of the complainants would be unduly prejudiced unless the injunction should issue immediately, and without notice. August 26, 1902, an injunction order, as prayed by the bill, was entered without notice. September 27, 1902, the court, on motion of the McNeil Grain Co., Charles G. McNeil, the Board of Trade of the City of Chicago, William F. Warren and George F. Stone, defendants, to dissolve the entire injunction order, dissolved it only as to the board of trade, its officers and directors, dismissed the bill as to them, but continued the injunction against McNeil, substantially as prayed by the bill.

September 28, 1902, before the above mentioned dissolution of the injunction as to said board of trade, its officers and directors, the board of trade and William S. Warren, its president, appealed from the order of August 26, 1902, by filing bond with the clerk of the Superior Court, approved by him, as is by the statute provided.

HENRY S. ROBBINS, attorney for appellants.

HIRAM T. GILBERT, attorney for appellees.

OPINION PER CURIAM.

It is not objected that the injunction order appealed from was entered without notice, nor can it be, for the reason that appellants had a hearing on the motion to dissolve the injunction. Cook County Brick Co. v. Kaehler, 83 Ill. App. 448.

Appellees' counsel contends in quite a lengthy argument,

which is to the effect that the first and third charges in McNeil's complaint charge acts which are merely willful violations of business contracts, and not acts of bad faith, that because not acts of bad faith, the proceeding of the board of directors of the board of trade is not a disciplinary proceeding, but one involving only property rights. The first and third charges, concisely stated, are as follows:

First. That the Weares, or the Weare Commission Company, have been guilty of an act of bad faith in refusing to transfer the open trades and balance of the McNeil Grain Company to another firm, when ordered so to do, and that they closed all such trades on the open market, to the great loss of the McNeil Company, and have withheld all sums deposited with said Weare Commission Company as margins, amounting to more than $32,000.

Third. That the Weares, or the Weare Commission Company, have been guilty of dishonest conduct in charging back to the McNeil Company a note made by a third person for the sum of $7,000, which had been transferred to the Weare Commission Company by the McNeil Company as margin, and subsequently disposing of the note to a bank, which will demand payment thereof on maturity.

The contention is that if these acts are not acts of bad faith, but mere willful violations of business contracts or obligations, the investigation of them is not disciplinary, but the complaint is, in substance, a suit for the recovery of money; and counsel refers to sections 9, 16 and 18 of rule 4 of the board of trade, which provide as follows:

"Sec. 9. When any member of the association shall be guilty of a willful violation of any business contract or obligation and shall neglect or refuse to equitably and satisfactorily adjust and settle the same, or when any member shall willfully neglect or refuse to comply promptly with the award of any committee of arbitration or committee of appeals, rendered in conformity with the rules, regulations and by-laws of the association, he shall be suspended from all the privileges of this association until such contract or obligation is satisfactorily adjusted and settled, or such award is performed or complied with.

"When any member shall be guilty of improper conduct

of a personal character in any of the rooms of the association, or shall violate any of the rules, regulations or by-laws of the association, or shall be guilty of any dishonorable conduct, for which a specific penalty has not been provided, he shall be suspended by the board of directors from all privileges of membership for such period as in their discretion the gravity of the offense committed may warrant. When any member shall be guilty of making or reporting any false or fictitious purchase or sale, or where any member shall be guilty of an act of bad faith, or any attempt at extortion or of any dishonest conduct, or when a member shall, either in the Exchange Building, or elsewhere, contract to give himself or another the option to sell or buy any of the articles dealt in on this Exchange, in violation of any criminal statute of this state, he shall be expelled by the board of directors.

"Sec. 16. All charges made to the board of directors against any member of this association for any default, misconduct, or offense, shall be in writing, and in duplicate, and shall state the default, misconduct, or offense charged; and the same shall be signed by one or more members of the association, a business firm, one or more of whose members shall be a member of the association, or by the chairman of a committee of the association.

"Sec. 18. It shall be the duty of the board of directors in case any grave offense or act of dishonesty committed by any member, involving the good name or dignity of the association, or any act of dishonesty on the part of a member, shall come to their knowledge, either by complaint or public report, to cause a preliminary or informal investigation to be made by a committee of their number into the truth or falsity of such complaint, or report; and if the said committee, after investigation, shall deem any member guilty of such offense, they shall so report to the board of directors, with specific charges; whereupon any member thus implicated shall be notified to appear before the board of directors in manner as provided by section 16 of this rule, and if found guilty, the said member shall be suspended or expelled as hereinbefore provided," etc.

Whether the acts mentioned in the first and third charges of the complaint are, or are not, acts of bad faith, or dishonest acts, is, as we think, a question properly determinable by the directors of the board, at least in the first instance; but whether they are, or not, dishonest acts, or acts on proof of

which the party charged might be convicted of bad faith, does not affect the question of the jurisdiction of the board of directors to hear and determine in respect to the charges. Counsel admits the acts charged to be willful violations of business contracts or obligations. Section 9 of rule 4 expressly provides that any member guilty of such violations, and who shall neglect or refuse to equitably and satisfactorily adjust and settle the same, etc., shall be suspended until he does so. But it is contended by counsel that the board of trade, through its directors, is powerless to adjudicate, without the consent of the parties, disputes between its members respecting business contracts and obligations. Section 6 of the charter is as follows:

"Sec. 6. Said corporation shall have the right to admit or expel such persons as they may see fit, in manner as prescribed by the rules, regulations and by-laws thereof."

The power to expel clearly includes the lesser power of suspension. In view of this section we can not hold that section 9, which applies to willful violations, by a member, of his contracts or obligations, is unauthorized by the charter of the board, or unreasonable. In People v. Chicago Board of Trade, 45 Ill. 112, the court say:

"The sixth section of the charter of the board of trade provides that 'said corporation shall have the right to admit or expel such persons as they may see fit, in manner to be prescribed by the rules, regulations or by-laws thereof.' Here is a specific grant of power, in terms so general that they seem to leave the causes of disenfranchisement at the discretion of the corporation, subject only to the one limitation that the proceeding shall follow the rules, regulations or by-laws."

In that case a by-law similar in terms to section 9, above quoted, was held reasonable.

In Board of Trade v. Nelson, 162 Ill. 431, 439, the court say:

"A by-law of this board, providing that if a member failed to comply with a business contract made with another member, he should be expelled, was held to be valid in People ex rel. Page v. Board of Trade, 45 Ill. 112. The court also held in the Nelson case that a by-law was

'unquestionably valid' which provided, 'When a member of the association shall be guilty of any act of bad faith, or any attempt at extortion, or of any other dishonorable or dishonest conduct, he shall be censured or expelled by the board of directors, as they may determine from the nature and gravity of the offense committed.'"

The board of directors was, at the time the present bill was filed, engaged in investigating the charges made in the McNeil complaint, in pursuance of valid by-laws, and it is not averred that the board was proceeding irregularly. It is thoroughly settled that, under such circumstances, the courts will not interfere by injunction.

In Board of Trade v. Nelson, *supra*, the court say:

"This corporation is not bound to admit any person to membership, nor was the relator in any way forced into such association. He voluntarily became a member, and by this contract is bound to abide by the rules and regulations of the board. The courts will never interfere to control the enforcement of by-laws of such association, but they will be left to enforce their rules and regulations by such means as they may adopt for their government. (People ex rel. Rice v. Board of Trade, 80 Ill. 134.) When the relator became a member of the board of trade he voluntarily submitted himself to the operation of all laws enacted for its government, and agreed to be bound by them so far as within the corporate authority." See, also, Board of Trade v. Riordan, 94 Ill. App. 298, and Green v. Board of Trade, 174 Ill. 585.

Counsel for appellees contends that the board of directors will not investigate or adjudicate as to the set-off claimed by appellees, on account of the alleged stock transactions of McNeil and Jolly, and that appellants, by moving to dissolve the injunction, admitted this. This contention is based on that portion of the bill quoted in full in the preceding statement, and which is, in substance, that complainants have been informed and believe that the board of directors has repeatedly ruled that it has no jurisdiction to investigate controversies between members of the board, arising out of any transactions other than those had upon said board, and, as a consequence, in case of complaint of failure to pay over money alleged to be due on transactions

had on the board, the board of directors has no power to investigate or determine whether the member so charged has or not any claim, not arising out of a transaction on said board, which, in law or equity, could be set off against the money alleged to be due the complaining member, and complainants say that the board of directors, on the hearing of the complaint against them, will not undertake to determine whether or not the McNeil Grain Co. is liable to the Weare Commission Co. on account of any of the stock transactions aforesaid.

A motion to dissolve an injunction on the ground of the insufficiency of the bill, admits no more than would a demurrer to the bill; and a demurrer admits only such facts as are well pleaded and, necessarily, such as existed prior to or at the time of filing the bill. The averment that the board of directors will not undertake to investigate or determine the liability of the McNeil Grain Company is not an averment of fact, but merely of the pleader's conclusion or opinion, deduced from the antecedent premise, viz., the alleged former rulings of the board of directors. The allegation in respect to such former rulings being on information and belief, it follows that the conclusion averred is also on information and belief. But this is not all. There is no basis in the record for the conclusion that the board will not investigate or adjudicate as to the liability of the McNeil Grain Company. The rulings of the board of directors are averred to have been that the board had no jurisdiction to investigate controversies between members, arising out of stock transactions other than those had on the board of trade, and it is not averred in the bill that the stock transactions in question did not take place on the board of trade, nor is there anything in the charter of that board prohibitory of stock transactions on the board. Therefore *non constat* but that the stock transactions in question were not on the board. It is well established that a pleading must be taken more strongly against the pleader. The court will not anticipate or presume that the board of directors will act unfairly or irregularly in the investiga-

tion of a complaint. Green v. Board of Trade, 174 Ill. 585, 592; Board of Trade v. Riordan, 94 Ill. App. 298, 308.

Section 9 of rule 4 of the board clearly contemplates a just and equitable settlement. The language is:

"When any member shall be guilty of a willful violation of any business contract or obligation and shall neglect or refuse to equitably adjust and settle the same," etc.

Appellees can not complain of the limitations of the power of the board of directors that the board can not compel the attendance of or administer oaths to witnesses, etc. When the Weares became members of the association they assented to the exercise of the granted powers of the board of trade and to the limitations thereof.

We are inclined to the view that the board of directors should not, while the indictment is pending and undetermined against McNeil, investigate as to the motive of the Weares in procuring that indictment, if they did procure it, and we can not anticipate that the board will so do. We think it would be inexpedient so to do, and perhaps contrary to public policy.

The objection to the fourth charge of the complaint is that it is too general. If too general, we can not anticipate that on proper application to the board of directors, the board will not rule McNeil to specify grounds for the charge, and if he refuses or neglects so to do, that the board will not ignore the charge.

It is urged by appellees' counsel that appellants have no right of appeal. They are party defendants to the bill, and, as shown by the statement preceding this opinion, they perfected their appeal from the original injunction order by filing their appeal bond with the clerk before that order was dissolved as to the said board of trade and its officers by the subsequent order of September 27, 1902. Therefore, they had, at the time they so filed their bond, full right of appeal, and the subsequent modification of the order did not affect that right. But the question remains, whether, the injunction having been dissolved as to the board of trade and its officers by the order of September 27th,

the complainants are, or not, in a position to question the validity of the injunction against McNeil. The court properly dissolved the injunction against the board of trade and its officers, but, by continuing it against McNeil, sought to do indirectly that which it could not legally do directly, namely, stop the hearing of McNeil's complaint. In Green v. Board of Trade, *supra*, the court say:

"As heretofore said, when such by-laws infringe no public policy or rule of law, and are not unreasonable, courts will never interfere to control their enforcement, but such corporations or associations will be left to enforce their rules and regulations in the manner they have adopted for their own government and methods of discipline;" citing numerous cases.

We think it manifest that to enjoin McNeil, who made the complaint, and who, as may be inferred from the bill, is the most important witness in support of it, is an interference by the court with the enforcement by the board of its by-laws. We think it clear that if McNeil is so enjoined there can not be a full and fair investigation of his complaint. If the court may thus enjoin one important witness, it may enjoin all, and thus control the board as certainly and effectually as if the board itself were enjoined. We are of opinion that the board of trade and its officers have a direct interest in the question.

One of the assignments of error of appellants is, that "the court erred in entering the interlocutory order of August 26, 1902, ordering an injunction writ to issue against Charles G. McNeil, in accordance with the prayer of the bill of complaint."

Appellees' counsel, not objecting to this assignment, filed his argument, in which he discusses the question whether the court erred as is assigned. This is equivalent to a joinder in error, the effect of which latter is to traverse the assignment of errors. The issue, therefore, whether the court erred as assigned by appellants, is presented by the record.

The court properly dissolved the injunction against the board of trade and its officers and continued it against

McNeil, because of the rule that while a court of law may not be enjoined from proceeding in an action, the suitor may be. High, in his work on Injunctions, section 48, says of such an injunction: "It is granted on the ground that an unfair use is being made of the legal form, which, from circumstances of which equity alone can take cognizance, should be restrained, lest an injury be committed wholly remediless at law," citing authorities. No such ground for interference appears in the present case. The appellees, each of whom, on becoming members of the board of trade, impliedly agreed to be bound by its charter and by-laws, can not be heard to say that the enforcement of such by-laws, in the regular way, is unfair, and, as heretofore stated, it can not be presumed that the board of directors will act unfairly or inequitably in the premises. The appellees have assigned as cross-errors that the court erred in dissolving the injunction against the board of trade, and also in dismissing complainant's bill, as amended, against the board of trade, Warren and Stone. These assignments of error are out of place on this appeal, which is from the original injunction order of August 26, 1902, and not from the subsequent order of September 27, 1902, in respect to which the assignments are.

Since the foregoing opinion was prepared a rehearing has been granted, and we have again considered, fully and carefully, the questions involved, and see no reason why we should change any of our conclusions.

The injunction order will be reversed.

MR. JUSTICE ADAMS, dissenting:

I am unable to concur in the opinion of the court, for the following reasons: It is manifest from the bill that there is a serious dispute, involving a large amount of money, between the Weare Co. and the McNeil Co. The former admits that were it not for the pecuniary losses of the Weare Commission Co., alleged to have resulted from fraudulent stock transactions of McNeil and Jolly, the

Weare Commission Co. would be indebted to the McNeil Grain Co., on account, to the amount of about $32,000; and the Weares claim that the loss to the Weare Commission Co., resulting from the fraudulent stock transactions, was at least $27,000, which they claim should, equitably, be set off against the claim of the McNeil Grain Co. McNeil, president of the latter company, denies the alleged fraudulent transactions, and refuses to allow the claim of the Weare Commission Co., or any part thereof. This dispute or difference between the parties renders it absolutely necessary for the board of directors, in passing on McNeil's complaint, to investigate and determine whether there were such fraudulent stock transactions by McNeil and Jolly as are alleged in the bill, and, if so, whether the Weare Commission Co. suffered pecuniary loss by reason of such transactions. In fact, the decision of this dispute will be decisive of the complaint, in so far as it relates to the claim of the McNeil Grain Co.

It is contended by counsel for the Weares that, under the charter and by-laws of the board of trade of the city of Chicago, the board of directors of the board of trade have no power to so investigate and determine. If this contention is sound, it is decisive of the controversy. Sections 7 and 8 of the charter of the board of trade are as follows:

"Sec. 7. Said corporation may constitute and appoint committees of reference and arbitration, and committees of appeals, who shall be governed by such rules and regulations as may be prescribed in the rules, regulations or by-laws for the settlement of such matters of difference as may be voluntarily submitted for arbitration by members of the association or by other persons not members thereof; the acting chairman of either of said committees, when sitting as arbitrators, may administer oaths to the parties and witnesses, and issue subpœnas and attachments, compelling the attendance of witnesses, the same as justices of the peace, and in like manner directed to any constable to execute."

"Sec. 8. When any submission shall have been made in writing, and a final award shall have been rendered, and no appeal taken within the time fixed by the rules or by-

laws, then, on filing such award and submission with the clerk of the Circuit Court, an execution may issue upon such award as if it were a judgment rendered in the Circuit Court, and such award shall thenceforth have the force and effect of such a judgment, and shall be entered upon the judgment docket of said court."

Section 7 is the only section or part of the charter which authorizes the board of trade, or any committee of the board, to investigate and determine as to differences between members of the board, and the authority is expressly limited to cases in which the matters of difference are voluntarily submitted for arbitration by the members differing, which submission must, by section 8, be in writing.

Section 7 is also the only section or part of the charter which confers authority to compel the attendance of witnesses and administer oaths to them, and it is evident that such powers are conferred solely for the purpose of the section, namely, the investigation and determination of differences between members voluntarily submitted for arbitration. The necessity for the exercise of these powers in cases of voluntary submission, in order that there may be a full and fair investigation, is made apparent by section 8, which gives to the award of the arbitrators the effect of a judgment of the Circuit Court, on filing the award and submission with the clerk of that court, and provides that execution may issue on it. Grants from the state are construed favorably for the state and strictly as against the grantee. Sedgwick on Construction of Statutes, 2d Ed., 291-2.

"All power exercised by corporate bodies, whether public or private, must be conferred by the government, either in express terms or by necessary and clear implication." Webster v. The People, 98 Ill. 343; Metropolitan Bank v. Godfrey et al., 23 Ib. 579, 602; Thomas v. Railroad Co., 101 U. S. 71, 82; Commonwealth v. Erie & N. E. R. R. Co., 27 Penn. St. 339.

In the last case, Black, C. J., a jurist of national reputation, delivering the opinion of the court, said:

"This case requires us to give a construction to the

charter of a private corporation. The frequency of such cases excites some surprise when we reflect that an act of corporation is and always must be interpreted by a rule so simple that no man, whether lawyer or layman, can misunderstand or misapply it. That which a company is authorized to do by its act of incorporation, it may do; beyond that all its acts are illegal. And the power must be given in plain words or by necessary implication. All powers not given in this direct and unmistakable manner are withheld."

In the same opinion is the following:

"If you assert that a corporation has certain privileges, show us the words of the legislature conferring them. Failing in this, you must give up your claim, for nothing else can possibly avail you. A doubtful charter does not exist; because whatever is doubtful is decisively certain against the corporation."

Powers existing by necessary implication are such as are necessary to the exercise of the expressly granted powers. The maxim *Expressio unius exclusio alterius est* is applicable here. Brown's Legal Maxims, 8th Am. Ed. 651; Huesing v. City of Rock Island, 128 Ill. 465; Gaddis v. Richland County, 92 Ib. 119, 123; Sammis v. Clark, 13 Ib. 544, 546; Sedgwick on Cons. of Statutes, 2d Ed., p. 31, and note a.

Section 7 being the only section of the charter which authorizes an investigation by the board of trade or any committee thereof, of differences between members of the board, and the authority therein conferred being limited to cases in which such differences are voluntarily submitted by the members differing, and the mode of proceeding in such case being plainly prescribed, the investigation of such differences not so voluntarily submitted, or otherwise than in the prescribed manner, is necessarily excluded. In Thomas v. Railroad Co., *supra*, the court say:

"We take the general doctrine to be, in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such and such only as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what

is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others."

The general rule in the interpretation of statutes is that when the mode of exercising a given power is prescribed, the power can be exercised only in the prescribed manner. Webster v. The People, 98 Ill. 349; Badger v. Inlet Drainage District, 141 Ib. 540, 541; Butler v. Nevin, 88 Ill. 575; People v. Weber, 89 Ib. 347; Dillon on Mun. Corp., 4th Ed., Sec. 449, and cases cited.

In the present case the appellants claim the right to investigate and decide in respect to the difference or dispute between the McNeil Grain Co. and the Weare Commission Co., without the consent and against the will of the latter company, and in a mode other than that prescribed. The first part of the second charge against the Weares, namely, that they "have been guilty of an attempt at extortion, in that they refuse to pay over to said McNeil Grain Company the balance due said McNeil Grain Company, $32,731.46, more or less," is evidently based on section 9 of rule 4 of the by-laws of the board of trade. Section 9 provides that any member of the association who shall be guilty of a willful violation of any business contract or obligation, and shall neglect or refuse to equitably and satisfactorily adjust and settle the same, shall be suspended from all privileges of the association until the same is satisfactorily adjusted and settled. The section also provides:

"When any member shall be guilty of an act of bad faith, or any attempt at extortion, or of any dishonest conduct * * * he shall be expelled by the board of directors."

Section 17 of article 4 provides for the examination of charges by the board of directors, notice of the charge to the accused, opportunity to be heard in his own defense, etc.

Section 9 does not, in terms, provide for an adjudication of differences or disputes between members, nor does it contemplate such adjudication. Taken in connection with section 17, it contemplates a trial of the member accused, and not an investigation of differences or disputes between

the accused and another member. In this respect it is in harmony with the charter. It is manifest that the board of directors can not discipline the Weares on the charge above quoted, without exercising a power withheld from that board by the charter, namely, the investigation and decision of the dispute between the McNeil Co. and the Weare Co. not voluntarily submitted as provided by section 7 of the charter. All that the board of directors could do in respect to the money demand of the McNeil Co., which is substantially admitted by the Weare Co., would be to investigate the disputed matter, namely, the cross-claim of the Weare Co., and this they are inhibited by the charter from doing. The effect of a decision against the Weares in respect to the dispute in question would be final, in the sense that their expulsion or suspension would follow as matter of course.

The contention of appellants is that notwithstanding the legislature has, in express terms, authorized voluntary written submissions of disputes between members of the association to a committee of arbitration, and has conferred on such committee power to compel the attendance of witnesses and administer oaths to them, nevertheless it was intended that the board of directors should have power to investigate and decide such disputes without voluntary submission of them, against the will of one of the parties, and without power to compel the attendance of witnesses or administer oaths to them. The mere announcement of such contention seems a sufficient answer to it.

In People v. Board of Trade, 45 Ill. 112, the following by-law was involved:

"In case any member of the association, having made any business contract, either written or verbal, and failing to comply promptly with the terms of such contract, shall, upon the representations of an aggrieved member to the board of directors, accompanied with satisfactory evidence of the facts, be by them suspended from all privileges of membership in the association until such contract is equitably or satisfactorily arranged or settled, when he may be restored to membership, and it shall be the duty of the

board of directors to cause to be publicly announced the suspension or restoration of any member under this rule."

In respect to this by-law the court say:

"One of the objects for which the board of trade was created undoubtedly was to promote a high standard of commercial honor and commercial credit in the city of Chicago, by securing among the members of the board a prompt discharge of their pecuniary obligations, contracted in their dealings with each other, without a resort to the expensive and dilatory procedure of a court of law. In order to accomplish this, the charter authorizes the board to create within itself tribunals of reference and arbitration, by whose decision the members shall be bound. But it does not confine the board to the use of these means for the attainment of these objects. It expressly gives the power of expulsion, and under that power the corporation has adopted this by-law, providing that, if a member fails to comply with a business contract made with another member, he shall be expelled. *This is somewhat different from the adjustment of disputes, which are properly referable to the committees of reference and arbitration. It applies to cases of non-compliance with contracts about which there is no dispute, necessary to be referred to one of these committees, as there was none in the present case.*"

The court, in using the language, "This is somewhat different from the adjustment of disputes, which are properly referable to the *committees of reference and arbitration*," evidently had in mind section 7 of the charter, which provides: "Said corporation may institute and appoint *committees of reference and arbitration*."

In People v. Order of Foresters, 162 Ill. 78, 84, the court say:

"Where the controversy is concerning the discipline or policy or doctrine of the order or fraternity, the member must resort to the method of procedure prescribed by the association, including the remedy by appeal, before invoking the power of the courts. But it is otherwise where a member claims money due from the society on its contract, or where the beneficiary of a deceased member claims money due from the society on its contract of insurance; in such case, the right to resort to the courts to coerce payment will not be abridged by the rights of appeal from a lower to a higher tribunal of the society as conferred by its

laws and rules. 'Courts of justice are freely open to those who seek money due them upon a contract.' (Niblack on Ben. Soc., and Acc. Ins., 2d Ed., Sec. 313; 2 Bacon on Ben. Soc. and Life Ins., Sec. 450; Zeliff v. Knights of Pythias, *supra;* Bauer v. Samson Lodge, 102 Ind. 262.) As was said in Zeliff v. Knights of Pythias, *supra*, 'In determining whether courts will take jurisdiction, a distinction must be observed between cases in which the association subjects its members to discipline for immoral conduct or for violation of the rules of the order, and those instances in which the member appeals to the court to secure property rights or to enforce money demands.'"

To construe the by-law, section 9 of article 4, as authorizing the decision by the board of directors of disputes between members of the association, involving money demands or rights of property, is not warranted either by the terms of the by-law or by the charter. The by-laws authorized by the charter, and to which members of the association must be presumed to have assented when they became members, are such as are authorized by the charter.

Section 1 of the charter authorizes by-laws, "not contrary to the laws of the land."

In Board of Trade v. Nelson, 162 Ill. 431, 439, the court say:

"When the relator became a member of the board of trade, he voluntarily submitted himself to the operation of all laws enacted for its government, and agreed to be bound by them, so far as within the corporate authority."

In Green v. Board of Trade, 174 Ill. 585, 591, this language is used:

"The by-laws to which such member agrees to submit are such as are authorized by the nature of the corporation and the laws of the country, and hence must not be contrary to the policy of the law, or unreasonable."

The question in respect to the power of the board of directors in the premises was not presented for decision in any of the cases cited by counsel for appellants, nor has it been in any case. In the case of Ryan v. Cudahy, 157 Ill. 108, the question might have been, but was not, presented. On the contrary, the court, referring to Ryan, the complainant in the bill, say:

"He voluntarily submitted to a trial of the matter referred to the committee, without in any manner calling in question the jurisdiction of the committee of the person or subject-matter. Under such circumstances, having selected his tribunal, he is estopped from denying the jurisdiction of the committee of the person and subject-matter."

In the same opinion the court, referring to People ex rel. Rice v. Board of Trade, say:

"Expressions may be found in the opinion of the court which may bear the construction that a court would not interfere, in any case, with the action of an organization like the board of trade; but these expressions were not necessary to a decision of the case, and can not be regarded as authority."

That a court of equity has jurisdiction of the case stated in the bill, is unquestionable; and the court was warranted, as ancillary to its jurisdiction, in enjoining the board of trade and its officers from entertaining and passing on McNeil's complaint, in so far as it involved the determination of the dispute between the McNeil Grain Co., and the Weare Commission Co., in regard to the claim of the latter company on account of the alleged fraudulent stock transactions, and in enjoining McNeil from prosecuting or aiding in any way in the prosecution of said complaint, in so far as it involved the determination of that dispute. The injunction granted is in accordance with the prayer of the bill, and goes to the entire complaint. In this respect it is too broad, and should be limited as above stated. This, however, is now of no practical importance as to McNeil, as, by the order or decree of September 27, 1902, the injunction was dissolved as to the board of trade and its officers, and modified as to McNeil by limiting it in the manner above suggested.

105 314
a203s 418

North Chicago Street R. R. Co. v. Adolph Rodert.

1. PRACTICE—*Court May, in Giving Instructions, Assume a Fact as Proven Which is Assumed by Parties.*—Where a fact is admitted or assumed by each party to the trial, the court, in a given instruction, may assume such fact as proven.

2. INSTRUCTIONS—*Substitution of Word "Negligence" for Word "Fault."*—The substitution of the word "negligence" for the word "fault" does not materially change the sense or the meaning of an instruction.

3. SAME—*As to Drawing Inferences.*—An instruction, that in determining what facts are proven in the case the jury should carefully consider all the evidence given before them, with all the circumstances of the transaction in question as detailed by the witnesses, and they may find any fact to be proved which they think may be rightfully and reasonably inferred from the evidence given in the case, although there may be no direct evidence of testimony as to such fact, is proper. Inferences can not be drawn from inferences, nor will presumptions arise from presumptions; but inferences may be drawn from facts proved, and presumptions may arise from facts previously established.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. JOSEPH P. ROBARTS, Judge presiding. Heard in this court at the March term, 1902. Affirmed. Opinion filed December 22, 1902.

JOHN A. ROSE and LOUIS BOISOT, attorneys for appellant; W. W. GURLEY, of counsel.

GEORGE A. MILLER and FREDERIC R. DEYOUNG, attorneys for appellee.

MR. PRESIDING JUSTICE BALL delivered the opinion of the court.

This is an appeal from a judgment in favor of the appellee for personal injuries.

Appellant, for one ground of reversal, insists that the evidence does not sustain the verdict.

In the statement of the case counsel for appellant say:

"The plaintiff was driving north on Halsted street, on the east side of the street. He turned to go to the west; one of the wheels came off the wagon and he was thrown to the ground, dislocating his shoulder. The evidence for

the plaintiff tended to show that a car belonging to the defendant came up from behind, struck the wagon and caused it to tip over. The evidence for the defendant, on the other hand, was to the effect that the wheel came off the wagon as the plaintiff attempted to turn out of the track and that the car did not strike the wagon at all."

Here is an admitted conflict in the evidence. Turning to the record we find five witnesses swore that the accident was occasioned by the car running into the wagon, and four witnesses testify that the car did not strike the wagon; that the car was from 50 to 150 feet to the rear of the wagon when the latter broke down, and that the accident was caused by the breaking of an axle of the wagon as appellee turned hurriedly out of the track. It is not necessary to cite cases in support of the proposition that, when the evidence is as conflicting as it appears to be in this case, the jury is the sole judge as to where the truth lies. The jury determined this question in favor of appellee. There is evidence fairly tending to sustain the finding. We can not disturb it. To do so would be to disregard one of the essential functions of a jury and thus tend to destroy its usefulness.

Counsel for appellant say that instruction number 2, given at the request of the plaintiff, is erroneous. It reads:

"2. The court instructs the jury that if you believe from the weight of the evidence that the injuries complained of by the plaintiff in his declaration were caused by the negligence or carelessness of the servants or employes of the defendant, or of any of them, in the course of their employment as such servants or employes, in manner and form as charged in the declaration, and without any fault on the part of the plaintiff which contributed to the injury complained of, then the defendant is liable in this action."

The objections are: First, that it assumes the plaintiff suffered the injuries complained of in his declaration. There is no issue made in this case as to whether or not the plaintiff was injured at the time and place in question. That he was injured to some extent is admitted and assumed on both sides. The law is that where a fact is admitted or assumed by each party to the trial, the court,

in a given instruction, may assume such fact as proven. Second, that because the instruction reads without any "fault" upon the part of the plaintiff, instead of without any "negligence" upon his part, it is erroneous. The substitution of the word "negligence" for the word "fault" would not materially change the sense or the meaning of the instruction. C. & N. W. Ry. Co. v. Ryan, 70 Ill. 215.

Counsel for appellant also complain of given instruction No. 4, which reads:

"4. The jury are instructed that in determining what facts are proved in this case they should carefully consider all the evidence given before them, with all the circumstances of the transaction in question as detailed by the witnesses, and they may find any fact to be proved which they think may be rightfully and reasonably inferred from the evidence given in the case, although there may be no direct evidence or testimony as to such facts."

They say that it gives the jury too much latitude in drawing inferences. The phrase objected to is approved in Binns v. State, 66 Ind. 431. Inferences can not be drawn from inferences, nor will presumptions arise from presumptions; but inferences may be drawn from facts proved, and presumptions may arise from facts previously established.

Finding no reversible error in the record, the judgment of the Circuit Court is affirmed.

Ernest J. Magerstadt, Sheriff, v. The People of the State of Illinois ex rel.

1. HABEAS CORPUS—*Order of Discharge Not a Final Order.*—An order of discharge upon a writ of habeas corpus is not a final order, in the sense that an appeal or writ of error may be prosecuted therefrom.

2. PROCESS—*When Sheriff is Protected in Making Arrest.*—A ministerial officer is protected in the execution of process, whether the same issued from a court of general or limited jurisdiction, although such court have not, in fact, jurisdiction of the case, provided it appears on the face of the process that the court has jurisdiction of the subject-matter, and the process, in other respects, shows no want of authority.

Magerstadt v. The People.

Habeas Corpus.—Appeal from the Criminal Court of Cook County; the Hon. EDWARD F. DUNNE, Judge presiding. Heard in this court at the March term, 1902. Reversed. Opinion filed December 22, 1902.

Statement.—Robert E. Burke filed his petition in said court praying a writ of habeas corpus, from which it appears that he was imprisoned and restrained of his liberty by appellant, the sheriff of Cook county and *ex officio* the jailor thereof, on two charges of embezzlement as a city official of Chicago, and is held by virtue of having been surrendered to said sheriff by two persons who were his sureties in two open court recognizances for Burke's appearance before the Criminal Court of Cook County, Illinois, from day to day, until the disposition of two certain indictments returned into that court, charging said Burke with having embezzled the funds of the city of Chicago received by him in his capacity of oil inspector of the city. The petition sets out the different counts of the two indictments and certain ordinances of the city of Chicago, on which it is alleged the indictments are based. The petition also alleges that the city of Chicago has no other claim against petitioner than that based on said ordinances; that the ordinances are void because in conflict with the general statutes of the state and the constitution, and that under said indictments there is no general law or any judgment, order or decree of any court to authorize any conviction upon the indictments against petitioner.

On a hearing before the Criminal Court upon the return of the writ of habeas corpus issued October 4, 1901, showing that the sheriff held Burke in custody by virtue of his surrender by his bondsmen, who directed the sheriff to arrest and hold said Burke, the petitioner was discharged, and it was further ordered that Magerstadt, sheriff, etc., should pay all costs of the proceeding on the petition for habeas corpus. From the order directing the sheriff to pay the costs this appeal was taken.

CHARLES S. DENEEN, state's attorney, for appellant; A. C. BARNES, assistant state's attorney, of counsel.

A. S. TRUDE, O'DONNELL & BRADY and DANIEL J. MCMAHON, attorneys for appellees.

MR. JUSTICE WINDES delivered the opinion of the court.

It appears from the record, and no contention to the contrary is made, that the proceedings in the Criminal Court resulting in the finding of the indictments against the relator, Burke, his subsequent surrender by his bondsmen to the sheriff and his retention in custody thereafter by the sheriff up to the time of his discharge, were in all respects regular and in accordance with the forms of law. No appeal is taken from the order of discharge by the Criminal Court, of the relator, and the only error assigned on this appeal is that the court erred in rendering judgment against the sheriff for the costs of the habeas corpus proceeding. It is contended for appellant, and to this contention counsel for appellees agree, that in order to determine whether or not there was error in rendering judgment against the plaintiff for the costs of the habeas corpus proceeding, this court should inquire whether the court's discharge of the relator was correct or otherwise. It is even urged upon the court by counsel for appellees, that the inquiry, on this appeal, should be broadened so as to review the question as to whether the fees of the office of oil inspector, which office it appears was held by the relator, belonged to him. We can not yield assent to this claim, notwithstanding the consent of appellees' counsel and their request that we do so. It is well settled in this state that an order of discharge upon writ of habeas corpus is not a final order, in the sense that an appeal or writ of error may be prosecuted therefrom. Hammond v. People, 32 Ill. 446–57, and cases cited; Ex parte Thompson, 93 Ill. 89; Hurd on Habeas Corpus, 573; Wallace v. Cleary, 5 Ill. App. 384; People v. Skinner, 19 Ill. App. 332.

It being clear that it is not within our province to consider the question as to whether relator was, or not, rightfully discharged, we should not, under the guise of a review of the court's order adjudging the costs against the sheriff, make such review, unless to do so is necessary to a decision

of the case before us. We should not, by indirection, sit in review of the action of the Criminal Court when we can not do it directly. We will not be made the instrument, by mere agreement and request of counsel, through which a decision may be rendered that we could not legally give upon the record before us.

If, however, it be conceded that, in passing upon the judgment for costs against the sheriff, we might properly determine whether or not the fees of the office of oil inspector belonged to relator, or whether he was rightfully discharged, it would not follow, if we found that these fees did belong to relator, and that the discharge was rightful, that the sheriff should be required to pay the costs of the habeas corpus proceeding. It is therefore not necessary, in passing upon the error assigned, to determine either of these questions. Furthermore, we are at a loss to conceive why the sheriff has any interest, beyond that of citizens generally, whether Burke was, or not, rightfully discharged. His general interest, in common with other citizens, would give him no right of appeal nor to assign error on the court's ruling in that regard. And it is fundamental that a party appealing can not be heard to complain of any matter in which he has no interest. The sheriff's only possible interest on this appeal is as to the correctness of the judgment for costs against him.

As has been stated, the indictments against Burke were duly, regularly, and according to the forms of law, found; he appeared before the Criminal Court and entered into a recognizance with his two sureties for appearance from day to day at the Criminal Court of Cook County, until the disposition of said indictments was made; that thereafter Burke's sureties, as they had a right to do under the statute (Hurd's, Ch. 38, Div. 3, Sec. 11), surrendered his body into the keeping of the sheriff, whose duty it was, under the statute (Hurd's, Ch. 38, Div. 3, Sec. 15), to hold him to answer said indictments. For such duty and service the statute (Hurd's, Ch. 53, Pars. 19 and 53) allows the sheriff his costs, to be paid to him in advance. (Id., Par. 58.)

It needs no citation of authorities, in view of these facts,

to sustain the position that the sheriff, a public officer, should not have assessed against him costs for doing a duty enjoined upon him by the law, and for which, under the law, he is entitled to have paid him, fees for his services.

Moreover, the proceedings against the relator being in all respects regular, in due form of law and by a court having jurisdiction of the subject-matter and of the person of the relator, by virtue of its process and his appearance before it and entering into a recognizance, the sheriff was fully protected in taking relator into custody. Cooley on Torts, Sec. 538, and cases cited; Lattin v. Smith, Breese, 361; Brother v. Cannon, 1 Scam. 200; Hill v. Figley, 25 Ill. 163; Chegary v. Jenkins, 5 N. Y. 376–80.

More than sixty-five years ago, in the Brother case, *supra*, the Supreme Court in speaking upon this point, said:

"If the magistrate had jurisdiction of the subject-matter, the officer was not bound to inquire further into the accuracy of his proceedings, but should have proceeded to obey the mandate of the warrant."

To the same effect the law is stated by Judge Cooley in the citation above and cases cited, including the New York case noted, in which it is said:

"A ministerial officer is protected in the execution of process, whether the same issue from a court of general or limited jurisdiction, although such court have not, in fact, jurisdiction of the case, provided it appears on the face of the process that the court has jurisdiction of the subject-matter, and the process, in other respects, shows no want of authority."

That the Criminal Court of Cook County had jurisdiction of the subject-matter of the crime with which the indictments charged Burke, can not be questioned. As we have seen, all the proceedings were regular, in due form of law, and the sheriff, pursuant to the surrender of Burke by his sureties, only did his legal duty, for the doing of which he was entitled to receive his costs, instead of having a judgment rendered against him for costs.

The judgment of the Criminal Court for costs against the appellant is reversed.

Esther L. Kohn v. Ezra J. Warner et al.

1. MORTGAGES—*Priority of Lien.*—A firm of brokers negotiated a loan of $12,000 for the owner of certain real estate. They prepared two notes, one for $9,000 and one for $3,000, also interest notes, and trust deeds securing the notes. The notes and deeds were dated April 22, 1895, and left with the brokers for sale. The $9,000 incumbrance they placed of record April 30, 1895, and the $3,000 one May 9, 1895. They charged full commissions for negotiating the loan, on April 22, 1895, and when the first payment of interest was due on the $9,000 mortgage, they charged such interest from the date of the note. On May 2, 1895, defendant became the owner of the $3,000 mortgage, and the $9,000 mortgage was sold by the brokers in January, 1896. *Held*, that the $9,000 note secured by trust deed was purchased by the brokers, and they were the purchasers from the time it was delivered to them until they sold it in January, 1896. It was recorded before the other mortgage, and was made superior to the $3,000 mortgage in the title guaranty certificate, and is therefore superior to such mortgage.

Bill to Foreclose a Trust Deed.—Appeal from the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge presiding. Heard in this court at the March term, 1902. Affirmed. Opinion filed December 22, 1902.

In April, 1895, John J. Leary owned certain real estate, subject to a deed of trust held by Knott & Lewis for $10,000, then maturing. For the purpose of paying off the $10,000 mortgage and other charges upon the property. Leary called upon the firm of Loeb & Co., real estate agents and mortgage brokers, and by written application requested these brokers to negotiate for him a loan of $12,000 upon his property. By this application Leary agreed to pay Loeb & Co. a brokers' commission of five per cent for negotiating the loan, and further authorized his brokers to receive the proceeds and disburse the same in payment of expenses and prior liens, including taxes and insurance. Loeb & Co. thereupon prepared a note for $9,000, due in five years, interest notes and trust deed securing the same, and also a note for $3,000, due in three years, interest notes and trust deed. The notes were all dated April 22, 1895, payable to the makers, and Leary and wife

at one and the same time signed and indorsed all the notes. At the same time Leary and wife executed the two trust deeds, both of which bore even date with the notes, were similar in form and covenants and conveyed to the same trustee the same "mortgaged premises." These notes and trust deeds were left with Loeb & Co. for sale. The $3,000 note and trust deed were sold to appellant and the $9,000 note and trust deed were sold to one C. F. Gray, from whom Warner purchased the same. Loeb & Co. paid off the Knott & Lewis trust deed, the taxes and other liens upon the premises, insurance premiums and expenses of loan. The Warner mortgage not being paid at maturity, he began a foreclosure proceeding, claiming that his trust deed was a first lien upon the premises. He made appellant a defendant. She answered and filed her cross-bill in the cause for the foreclosure of the Kohn mortgage. In her cross-bill, appellant alleged that the Kohn and Warner mortgages were executed simultaneously, and as parts of one and the same transaction; that appellant, on May 2, 1895, became the owner of the Kohn mortgage, and on that day paid to Leary and wife the entire principal and interest thereby evidenced; that at that time and at the time of the recording of the Kohn trust deed on May 9, 1895, nothing had been paid to Leary and wife on account of the Warner mortgage, and that at that time and for a long time thereafter the Warner mortgage was the property of and in the possession of said Leary and wife; that the Warner mortgage is subsequent as a lien to the Kohn mortgage, and subject thereto.

Issues having been joined on bill and cross-bill, the cause was referred to a master in chancery for hearing. The master by his report found that the Warner mortgage being first of record, was a first lien upon the premises. This report, upon argument, was confirmed by the chancellor. From the decree entered thereon appellant perfected this appeal.

JACOB W. LOEB and SIGMUND E. LOEB, attorneys for appellant.

JAY D. MILLER, attorney for appellees; ROSENTHAL, KURZ & HIRSCHL, of counsel.

MR. PRESIDING JUSTICE BALL delivered the opinion of the court.

It is admitted that Loeb & Co. took these two principal notes and the trust deeds, respectively, securing the same from Leary to sell for the purpose of paying off the Knott & Lewis incumbrance, the taxes and other liens upon the property, their expenses and commissions, and to render the overplus, if any, to Leary.

It is claimed that appellant, who is the daughter of William Loeb, the trustee in said two trust deeds, he being a member of the firm of Loeb & Co., purchased and paid for the $3,000 note and trust deed about May 2, 1895, and that Gray purchased and paid for the $9,000 note and trust deed January 10, 1896.

Loeb & Co., while these notes were in their possession, recorded the trust deeds. The $9,000 incumbrance, known as the "Warner mortgage," they placed of record April 30, 1895; and the $3,000 incumbrance, known as the "Kohn mortgage," they placed of record May 9, 1895. Each of these trust deeds, which were identical in all covenants and agreements, bore the same date, April 22, 1895, and were signed and acknowledged by Leary and wife at one and the same time. The principal note in the Kohn mortgage matured three years after date, and that in the Warner mortgage ran for the term of five years from date.

Loeb & Co., on April 30, 1895, procured a title guarantee policy upon the Warner mortgage, showing no incumbrances except the "rights or claims of parties in possession, not shown of record." On the 9th of May, 1895, Loeb & Co. procured another title guarantee policy upon both of these mortgages, subject only as last above, and adding, "No guaranty is hereby made as to priority of lien of the trust deeds described in Schedule 'A' of this policy." The trust deeds referred to are the two trust deeds which are here involved.

Loeb & Co., on May 9, 1895, procured a third title guarantee

policy upon the Kohn mortgage, subject to the rights of parties in possession, and also subject to the $9,000 Warner mortgage, which was recorded April 30, 1895.

When Loeb & Co. took these two trust deeds from Leary and wife, they opened and kept the following account upon their books:

"CHICAGO, April 22, 1895.

JOHN J. & BRIDGET ANN LEARY.
In account with A. LOEB & BROTHER.

			Credit.
By cash on account of loans, $9,000 & $3,000			$12,000 00
	To cash on account of commission	$600 00	
	To cash on account of continuation of abstract	10 00	
	To cash on account of recording fees	1 30	
	To cash on account of examination of title, title guarantee policy	55 00	
	To cash on account of insurance		
	To cash on account of Rec. 2nd trust deed.	1 30	
May 28th	To cash on account of to check currency	325 00	
June 4	To cash on account of Loeb & Adler fee	20 00	
7	To cash on account of check currency	50 00	
11	To cash on account of Knott & Lewis Enc. & release	10,075 00	
11	To cash on account of recording release	65	
May 18	To cash on account of to check taxes	660 98	
May 18	To cash on account of to check	50 00	
June 12	To cash on account of to check	150 77	
			— $12,000 00

Know all men by these presents, that we, John Leary and Bridget Ann Leary, in consideration of the sum of one hundred and fifty 77-100 dollars to us in hand paid by A. Loeb & Brother, being the balance coming to us on the above loan after deducting from such ..... all commissions, expenses and disbursements, according to agreements, as above correctly specified, do hereby acknowledge full satisfaction and payment of any and all claim which ..... may have against said A. Loeb & Brother on account of said .....and hereby acknowledge the correctness of the settlement above made and of the notes and trust deeds heretofore executed by.....

Witness our hand and seal this twelfth day of June, 1895.

JOHN J. LEARY, [SEAL]
BRIDGET A. LEARY, [SEAL]
By J. J. LEARY, her agent."

It will be seen from an inspection of this account that Loeb & Co., on April 22, 1895, credited Leary and wife with the proceeds of both of these principal notes, and on the same day charged them with full commissions ($600) for negotiating the loans. They follow these items by a charge of $55 for the title guarantee certificate upon the Warner mortgage, in which that mortgage is subject to nothing except the rights of parties in possession. May 5, 1895, Loeb & Co. charge Leary and wife, for taxes paid, the sum of $660.98. June 11, 1895, they paid off the Knott & Lewis prior incumbrance at a cost of $10,075. June 12, 1895, they paid Leary and wife $150.77, thus expending and accounting for the entire $12,000, and then took their receipt in full to close the account.

From a careful examination of the whole record, we are satisfied that Loeb & Co. became the purchasers of the Warner mortgage, and that in law and in equity they were such purchasers from the time it was delivered to them by Leary and wife until the time they sold it to Gray. On the date that they received the Warner mortgage they credit Leary and wife with its face value. They then charge them with full commissions for its sale. They record the Warner trust deed April 30, 1895, ten days before they record the Kohn trust deed. They procure a title guarantee certificate upon the Warner mortgage, in which that

mortgage is subject to nothing except the rights of parties in possession. They take out a title guarantee certificate upon the Kohn mortgage, making it subject to the Warner mortgage. When the first payment of interest is due on the Warner mortgage, they charge Leary and wife with such interest from the date of the note and trust deed. They pay the Knott & Lewis incumbrance on June 11, 1895, and on the next day pay out the remainder of the $12,000 —thus closing out this entire account six months before the Warner mortgage was sold to Gray.

It follows that the Kohn mortgage is subject and not superior to the Warner mortgage. In this view of the case it is unnecessary for us to consider any other of the contentions raised by appellant. Considering the entire record, we can not say that the findings of the decree are manifestly against the evidence.

The decree of the Circuit Court will be affirmed.

Jesse C. Wheaton v. Fred A. Bartlett.

1. CONTRACTS—*Rules of Construction.*—The object to be aimed at in construing a contract is to discover and give effect to the intention of the parties. Where a clause is capable of two constructions, one which will give it some operation, and the other which will render it meaningless, the contract should be so construed as to render the clause effectual. Each part of the instrument should be viewed in the light of the other parts thereof, in order to arrive at the intention of the parties.

2. SAME—*Prior Parol Agreements Can Not Vary the Terms of a Written Contract.*—A written contract can not be contradicted or varied by evidence of an oral agreement entered into between the parties before or at the time of making such contract.

3. PARTNERSHIP—*Not a Legal Entity.*—A partnership is not a legal entity.

Assumpsit.—Appeal from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Reversed and remanded. Opinion filed December 30, 1902.

This is a suit in assumpsit, brought by appellee against Jesse C. Wheaton, appellant, also I. B. Jones and Harry

Griffith, as copartners as Griffith & Company, upon a promissory note reading as follows:

"$900.00. CHICAGO, Nov. 1, 1899.

Within one year after date, we promise to pay to the order of Fred A. Bartlett, nine hundred and 00-100 dollars, at Metropolitan National Bank of Chicago, payable as follows: Twenty-five dollars ($25.00) on the 15th of each month following this date; balance payable November 1, 1900.

The personal liability of J. C. Wheaton, I. B. Jones and Harry Griffith is hereby limited to three hundred dollars, with six per cent interest from date.

Value received; interest at the rate of —— per cent per annum.

GRIFFITH & Co.,
35 River St."

The declaration consists of a special count upon the note and the common counts. The special count complains of Isaac B. Jones, Harry R. Griffith and Jesse C. Wheaton, copartners as Griffith & Company, and alleges that the above-named defendants, under the name and style of Griffith & Company, executed and delivered to plaintiff (appellee) said note; also alleges that $175 have been paid on account of said note by the firm of Griffith & Company, and $125 by Jesse C. Wheaton; and that defendants, under the style of Griffith & Company, promised and agreed to pay the said sum of $900.

An order of default of Jones on personal service was entered. Jesse C. Wheaton filed plea of general issue to the special and common counts. Special pleas to the special and common counts denying execution of the note and special pleas to all the counts denying joint liability were filed.

The abstract of record does not clearly set forth the state of the pleadings as to Jesse C. Wheaton, but the cause was submitted to the court for trial without a jury by the defendant Wheaton upon the issues as made; and as no evidence offered by the defendant was excluded because of the state of the pleadings, it will be unnecessary to inquire further.

The court found the issues for the plaintiff and against

the defendant, Jesse C. Wheaton, and assessed plaintiff's damages at the sum of $668.55.

It is conceded by both parties to this suit, that Wheaton, Jones, Griffith and Bartlett were members of the firm of Griffith & Company, and that his partners bought the interest therein of Bartlett and gave him therefor the note in question, and continued the business in the same name. Counsel for defendant offered to prove that "defendant, in the presence of plaintiff, refused to purchase plaintiff's interest in said firm and to consent to the giving of said note therefor, unless the following clause—'The personal liability of J. C. Wheaton, I. B. Jones and Harry Griffith is hereby limited to $300'—was inserted therein, and that thereupon, in plaintiff's presence and with his consent, said clause was inserted in said note, signed by said Griffith and delivered to plaintiff."

The court refused said offer to hear evidence thereunder, holding that such evidence could not be considered in construing said note; and to this ruling of the court, Wheaton, by counsel, duly excepted.

HECKMAN, ELSDON & SHAW, attorneys for appellant.

E. C. MAPLEDORAM, attorney for appellee.

MR. JUSTICE BURKE delivered the opinion of the court.

The construction of the note introduced in evidence is the sole question involved in this case. Appellant contends that the clause purporting to limit his liability will be given effect when the language alone of the note is properly construed, and that if there be doubt as to its meaning, parol evidence is admissible to show the intention of the parties in inserting such clause.

The object which is to be aimed at in construing the contract of the parties is to discover and give effect to their intention. Where a clause in a contract is capable of two constructions, one which will give it some operation and the other which will render it meaningless, the contract should be so construed as to render the clause effect-

ual. Each part of the instrument should be viewed in the light of the other parts thereof, in order to arrive at the intention of the parties. These are elementary propositions requiring the citation of no authorities and which must be applied to the interpretation of the language of this note. The meaning of the agreement as to liability in this clause of the note is to be found in its words read in the light of surrounding circumstances as disclosed by the evidence. Street v. Wharfing and Storage Company, 157 Ill. 605; Ferry v. Miltimore, 64 Ill. App. 557.

The abstract does not show of what kind of partnership the new firm was, whether trade, professional or other kind; and even though the signing of this note did not come within the scope of the partnership, still as between the members of the new firm and Bartlett, the liability to Bartlett could have been made joint, and a partnership liability. It is a legal presumption that Griffith, Jones and Wheaton, through the said purchase from Bartlett, each acquired an undivided third interest therein, whether purchased by them as partners, or as individuals. However, under the rules of construction of contracts, no meaning must be imported into the note which the law does not place there, and it is therefore impossible to say from the note itself whether the undertaking, even if joint, is that of the members of a partnership as such, or of the members as individuals. A partnership is not a legal entity. Meadowcroft v. People, 162 Ill. 56.

It is true the note is signed Griffith & Company, but are Griffith & Company a partnership of such kind that this note can become a partnership liability as distinguished from the joint liability of three men not in partnership? Bearing in mind that each of the three acquired an undivided one-third interest of the retiring partner, such interest passed through each purchaser before it became, if ever, a portion of the assets of the new firm. What Bartlett sold was his interest in the net balance of the assets of the firm remaining due him after all partnership debts were paid and the equities between him and his copartners were

adjusted. Sindelar v. Walker, 137 Ill. 43; Trowbridge v. Cross, 117 Ill. 109.

The abstract shows that Wheaton, Griffith and Jones bought out their partner and thereafter formed the new firm. The abstract shows that the sale and purchase did not follow, but preceded the creation of the new firm. It therefore follows that Wheaton, Griffith and Jones did not as the new firm, but did as individuals, purchase the interest for which the note in question was given. Moreover, there is some conflict among the authorities as to whether parol evidence is admissible, and if so, how far, to reconcile and make effectual the various terms and clauses of the note.

It is a principle of evidence that a written contract can not be contradicted or varied by evidence of an oral agreement entered into between the parties before or at the time of making such contract; consequently, parol evidence of an oral agreement alleged to have been made at the time of making the note in question can not be permitted to vary, add to or subtract from the absolute term of the written instrument. Walker v. Crawford, 56 Ill. 444.

From this record we do not know of what the assets or property of the old firm of Griffith & Company consisted, and it was doubtless intended that Wheaton, Griffith and Jones should proceed with the business, whatever it may have been, and that the new firm from its business would pay this note according to its terms; and judging from the indorsements which appear on the note, the firm did pay at the rate stipulated for six months, and then six payments of $25 each were made by appellant, but whether these payments were made by him with partnership assets or not, the record does not show. It is evident from a careful reading of this note and from the facts of the case, that the payee accepted it as though it read, "We, each, however, limiting his personal liability to $300, promise to pay, etc., $900; but to make up this sum, each one of us does not hereby make himself personally liable to pay more than $300." This reading of the note does not

seem to do violence to its meaning and true intent. The payee and retiring partner accepted, for reasons of his own, this note with such limitation.

It is not an unnatural construction to be given to the note. It would be absurd, in an attempt to give effect to this clause limiting liability, to say that it was merely a memorandum of adjustment by and between Wheaton, Jones and Griffith. Such an agreement certainly would not bind creditors of the firm and would not make more certain the respective interests of Wheaton, Jones and Griffith.

We hold that the trial court was right in refusing to receive parol evidence that would modify the note; but as we understand the offer of counsel, the evidence offered might have been received without committing reversible error, for it would not have contradicted or modified the note; but we think that in view of the state of the record and the relation of the parties admitted by counsel, and the context of the note, that the court erred in entering judgment.

As the case must be retried, the issues should first be formed and regard be had to the condition of the record as to the pleadings.

The judgment is reversed and the cause remanded.

---

105 331
a206s 404

Knights Templars and Masons Life Indemnity Co. v. Henrietta H. Vail.

1. FORFEITURES—*Not Favored by the Law.*—Forfeitures are not favored by the law; it has been said that they are so odious that courts will resort to all reasonable methods of interpretation and proceeding for the purpose of avoiding them.

2. INSURANCE—*Where Company has Funds in its Hands Belonging to the Insured Applicable to Payment of Assessments.*—The constitution of a mutual insurance company provided that at the end of each ten years continuous membership the member should receive a bond, bearing three per cent annual interest, for such a proportion of the surplus on the first day of the month nearest preceding, as all the money

paid during the ten years by him on his existing policy should bear to the entire amount of money received by the company during the same period, and that any such bond could be used at par, and accrued interest at any time, without notice, in payments of assessments, and that no bonds should run longer than the life of the member, but, if unused, should be payable with his policy at death, while in the bond so issued it was provided that in order to use the bond in payment of assessments or dues on said policy the bond must first be surrendered to and in the possession of said company for cancellation before the same or any part thereof could be so applied in payment of said assessments or dues. *Held*, that the constitution may be construed to provide that the bond can be used in payment of assessments, either by the company or by the insured, as it is inequitable and against the policy of the law to permit an insurance company to forfeit a life policy for non-payment of a premium, when such company has in its possession the money of the insured to an amount covering the premium, and which it has the power to apply to its payment.

Assumpsit, on a policy of life insurance. Appeal from the Superior Court of Cook County; the Hon. MARCUS KAVANAGH, Judge presiding. Heard in this court at the October term, 1901. Affirmed. Mr. Justice WATERMAN, dissenting. Opinion filed December 30, 1902.

November 2, 1888, Charles A. Vail received from appellant a life insurance policy in part as follows:

EXHIBIT A.

$5,000 POLICY OF MEMBERSHIP. No. 6261.

In consideration of twelve dollars and the agreements and stipulations herein expressed, Charles A. Vail, bookkeeper, of Ravenswood, Illinois, is admitted to membership in *the Knights Templars and Masons Life Indemnity Company* for the term of *life*, from the second day of November, 1888, at 12 o'clock noon. And in further consideration that the said Charles A. Vail shall pay all dues and assessments made upon him as such member, in pursuance of the constitution and by-laws of said company, at the times and in the manner required of him, the said company will pay the sum of five thousand dollars. At the end of each ten (10) years continuous membership the said Charles A. Vail shall receive a bond bearing three (3) per cent annual interest, payable with the bond, for his entire proportion of the surplus, as per article seven (7), section two (2), which bond is available at any time, without notice, in payment of assessments, as set forth in article seven (7), section three (3), of the constitution on the back of this policy.

This policy is issued and the said Charles A. Vail is admitted to membership in this company, and this policy is accepted by said member, upon the following agreements and stipulations, which are made a part of this contract:

1st. The application on which this policy is issued is made a part of this policy, by reference thereto.

2d. Any failure to pay assessments, as provided in conditions printed on the back of this policy, shall forfeit the membership in this company of the holder of this policy, and all benefits arising therefrom; but may be subsequently restored upon such terms as the directors of the company may fix.

8th. It is further agreed that the constitution or by-laws printed on the back of this policy shall separately and collectively form and be a part of this contract.

This 2d day of November, 1888.

J. ADAMS ALLEN, President.

Countersigned by

W. H. GRAY, General Manager.

Section 1. Upon notice and satisfactory proof of the death of a member (should it be necessary to make an assessment), the company, or such person as the board may direct, shall send by mail, to the last recorded post-office address of every member, a notice containing the name and residence of the deceased member, and the amount due from the member to whom said notice is sent. The party sending such notice may employ a suitable person, persons or corporation, in any town or city, who may act in serving such notices either personally, or by mail. A notice so sent or served shall be deemed and taken to be a lawful and sufficient notice for the payment of the assessment required.

Sec. 2. Should any one fail to forward, as indicated in the notice, the amount thus due, for a period of ten (10) days after the date of said notice, he shall forfeit his membership and all benefits arising therefrom. Any one having thus forfeited his membership may be reinstated, he being alive, within thirty (30) days after the date of said notice, by the payment of all arrearages, and may be reinstated to membership subsequent to the thirty days, upon such terms as the board of directors may fix.

Sec. 3. Any member may make a deposit in advance for the payment of his assessments, which money shall be used for no other purpose by the company, and in case of the member's death before it is so needed, the unused balance shall be paid back with the policy.

ARTICLE VII.

BENEFITS.

Section 2. At the end of each ten years continuous membership such member shall receive a bond, bearing three per cent annual interest for such a proportion of the surplus, on the first day of the month nearest preceding, as all the money paid during the ten years by him on his existing policy bears to the entire amount of money received by the company during the same period.

Sec. 3. Any such bond can be used at par, and accrued interest, at any time, without notice, in payment of assessments, and no bond shall run longer than the life of the member, but, if unused, shall be payable with his policy at death.

Sec. 6. Any member having designated his beneficiary or beneficiaries may change the same at his pleasure, without notice to or consent of the beneficiary or beneficiaries, and all accepting any interest in this policy or company do so upon these express terms.

At a meeting of the board of directors of the defendant company held on April 25, 1894, the following, among other proceedings, were had and done, to wit:

"The following preamble and resolutions were adopted:

'Whereas, on the 27th day of next May it will be necessary under the provisions of the constitution of this company to begin the issuing of interest-bearing bonds to such policy holders as have retained ten years continuous membership in this company, from and out of the surplus fund in its possession, therefore,

'Resolved, that the surplus fund of the company applicable to the redemption of said bonds and interest shall be determined on the first day of each month, beginning May 1, 1894, by taking the cost value of the bonds and securities then in possession of the company and adding thereto the amount of cash on hand, from which aggregate amount shall be deducted the amount of total liabilities of the company, which liabilities shall include all death losses reported and unpaid at that time.

'Resolved, that from and after May 27th next, as the respective policies in this company mature their ten year period, the executive officers of this company be authorized and directed to issue to each of such individual policy holders as may have continued their policy in this company for ten consecutive years, a bond in such amount, bearing inter-

est, and applicable or payable as provided in the constitution of this company, and ascertained in accordance with the calculation as provided by the foregoing resolution.'"

The form of the bond to be given to policy holders of ten years standing in this company was considered and the form attached, marked "Exhibit A," was adopted.

("Exhibit A" attached to said resolution was a form identical with the form of "Exhibit C" attached hereto.)

On November 2, 1898, a paper designated a bond, for the sum of $66.30, with a slip printed in red ink attached thereto and made a part thereof, was executed by the defendant company and delivered to the said insured.

Such bond is as follows:

EXHIBIT C.

UNITED STATES OF AMERICA.

THE KNIGHTS TEMPLARS AND MASONS LIFE INDEMNITY COMPANY OF CHICAGO. DECENNIAL SURPLUS FUND BOND.

Canceled 5c. Int. Rev. Stamp.

The Knights Templars and Masons Life Indemnity Company, a corporation duly organized and existing under the laws of the State of Illinois, for value received, and in pursuance of the provisions of sections 2 and 3, article 7, of the constitution of said company, hereby promises and binds itself to pay the sum of sixty-six and 30-100 dollars, with interest at the rate of three per cent per annum, in the manner, for the purpose, and upon the terms and conditions following, to wit:

That said sum represents the proportion of the surplus fund of said company that Charles A. Vail is entitled to, as holder of policy number 6261 in said company, and having been a member thereof for ten continuous years. That this bond, with accrued interest, may be used at par by the said member at any time during his life, in payment of assessments or dues on said policy, but in that event this bond shall be surrendered by him to said company for cancellation, and the amount thereof, with accrued interest, shall be placed to his credit as a deposit in advance for the payment of such assessments or dues. That in order to use this bond in payment of assessments or dues on said policy the bond must first be surrendered to and in the possession of said company for cancellation before the same or any part thereof can be so applied in payment of said assessments or dues. That should this bond be not so used in

the payment of assessments or dues, the same, with accrued interest, shall be paid at the death of the said member with his said policy, it being then in force, to the beneficiary or beneficiaries named therein. Provided, however, that whenever, for any cause, the said policy shall become forfeited and void, this bond shall thereby cease to be valid and binding and become forfeited and void. That this bond shall be received by the said member with the understanding that it is not negotiable or transferable, and is available for no purpose other than that hereinabove expressed.

In witness whereof the said The Knights Templars and Masons Life Indemnity Company has caused these presents to be sealed with its corporate seal and signed by its president and attested by its general manager at the city of Chicago, Illinois, this 2d day of Nov., A. D. 1898.

(K. T. & M. L. I. Co. Seal.)

Attest: By W. H. GRAY, General Manager. GEO. M. MOULTON, President.

(Red slip attached to bond:)

Your special attention is called to the fact that no part of this bond can be applied to keeping your policy in force except by its being surrendered to the company as herein specified. ("Exhibit C." 5th.)

On June 2, 1899, notice of assessments 182 and 183, theretofore regularly made by the directors, was mailed to the insured at his last recorded post-office address, and received by him in due course.

Assessments for which this notice was sent were payable June 12, 1899, amount due being $15. This amount was never paid, or offered to be paid, either by Vail or any one for him, during his lifetime.

Insured's policy was canceled on the books of the company for non-payment of the June, 1899, assessment. No assessment was levied against the insured after the June, 1899, assessment, and he never offered to pay the June, 1899, assessment, or any subsequent assessment, which was levied against other members of the company.

The insured died October 2, 1899. His death was reported to the defendant company on or about October 5, 1899, by his son, who was advised by letter, dated October 11, 1899, as follows:

"KNIGHTS TEMPLARS AND MASONS LIFE INDEMNITY CO. OF CHICAGO.

W. H. Gray, General Manager.
Home office, Masonic Temple.

CHICAGO, Oct. 11, 1899.

EDWARD VAIL, 315, 100 Washington St., City.

DEAR SIR: Yours of the 9th received. In reply will say, we are unable to forward blanks to be used in the case of your late father, as he was not a member of this company at the time he died, his policy having been canceled for non-payment of the June, 1899, assessment.

Yours respectfully,
W. H. GRAY,
General Manager."

The insured never made any request during his lifetime, either by himself or any one in his behalf, for reinstatement of his policy of membership in the defendant company.

The insured never made any offer at any time after the issuance of the paper designated a bond, above mentioned, to surrender same for cancellation, nor any request that the amount of the said paper, with accrued interest, should be placed to his credit as a deposit in advance for the payment of such assessments or dues as might thereafter become due and payable from him to the defendant company. On the contrary, the insured retained in his possession said paper designated a bond, up to time of his death.

It is admitted by the plaintiff that there was a valid forfeiture of the policy, membership, and all interest of the insured in the defendant company, for the non-payment of the June, 1899, assessment, unless such forfeiture was prevented as a matter of law in the manner hereinafter set forth in the plaintiff's claim.

The plaintiff's claim is that said policy and membership did not forfeit for non-payment of the June, 1899, assessment, because the insured had an interest in the funds of the defendant company, to the extent evidenced by the paper designated a bond, at the time when forfeiture would otherwise have occurred by non-payment of said assessment,

which said interest was not forfeited, and should have been applied, without any action on the part of the insured, to the payment of this and subsequent assessments.

The defendant's claim is that under the provisions of the contract and paper designated a bond, the non-payment of the June, 1899, assessment worked a forfeiture of the policy, membership and paper designated a bond, together with every interest of any kind which the insured theretofore had in the defendant company, and terminated his connection with said defendant company.

It is admitted that if the insured had offered the paper, designated a bond, for surrender and cancellation at any time when the said June, 1899, assessment was payable, he would have received credit for the amount thereof, with accrued interest, and the amount so credited would have been applied first to the payment of the June, 1899, assessment and the balance would have been applied to the payment of future assessments and dues until exhausted.

It is admitted by the defendant that if said paper designated a bond had been so offered and surrendered and the amount thereof credited, such amount would have been sufficient to pay the June, 1899, assessment and all subsequent assessments levied on its membership prior to the death of the insured.

It was further stipulated that if the court holds on the foregoing proposition of law in favor of the plaintiff and against the defendant company, then a judgment may be entered against said defendant company for the sum of $5,000, and interest thereon at the rate of five per cent per annum from December 11, 1899, to the date of entering such judgment. And that if the court holds on the foregoing proposition of law in favor of said defendant company and against said plaintiff, then judgment may be entered herein against plaintiff herein for costs.

The court found the issues for the plaintiff and rendered judgment against appellant for $5,392.50.

HERVEY BRYAN HICKS, attorney for appellant.

ELMER ALLEN KIMBALL and SPENCER WARD, attorneys for appellee.

MR. PRESIDING JUSTICE WATERMAN delivered the opinion of the court.

It is manifest that in preparing the form of bond issued in this case by the company to the assured, pains were not taken to have it correspond in all respects with the constitution of the company. The policy of membership issued to the assured provided that he should receive a bond, bearing three per cent annual interest on his proportion of the surplus, which bond should be available at any time without notice in payment of assessments as set forth in article 7, section 3 of the constitution on the back of the policy.

The constitution did not provide that the bond could be used only upon surrender of the same; neither did it provide that if the policy were forfeited, the bond should be likewise; neither did it provide that the bond should not be negotiable or transferable, or that it should be available for no purpose other than that expressed in the bond (which was for use in the payment of assessments), provided it were first surrendered to and in the possession of the company for cancellation. Forfeitures are not favored by the law; indeed, it is sometimes said they are so odious that courts will resort to all reasonable methods of interpretation and proceeding for the purpose of avoiding a forfeiture. The constitution provides that the bond can be used at par and accrued interest at any time, without notice, in payment of assessments, and that if unused it shall be payable with the policy at the death of the insured. It is neither a strained nor forced construction of the constitution to say that its provision is that the bond can be used in payment of assessments, either by the company or by the assured. Especially is this the case, when the bond has been, without having been so required by the constitution, made non-transferable and non-negotiable, and if unused, is payable with the policy at the death of the assured. The company thus has in its hands means for completely protecting itself.

If all or a portion of the bond be by it used in payment of assessments, without the request of the assured and without a surrender or cancellation of the same, as the bond is non-transferable and not negotiable, and payable only at the death of the assured, when after such death presented, the company can readily show, if such be the case, that all or a portion thereof has been used in payment of assessments. The fact that the bond was received and retained by the assured without protest against the conditions imposed therein, not contained in the constitution, did not constitute a contract upon his part to a change in the conditions of his policy, which were that he was to receive a bond in accordance with the constitution.

It is urged by appellant that the company could not make use of the funds in its hands belonging to the assured, represented by the bond, in payment of assessments, without his request that it so do.

In Girard Life Ins. Co., Adm'r of Ed. McGarge, v. Mutual Life Insurance Co. of New York, 97 Pa. St., p. 15, the court say:

"It is quite possible there may be facts which in the judgment of the officers of the defendant company justified them in declaring the policy forfeited in this case, yet we are constrained to say that it is inequitable and against the policy of the law to permit an insurance company to forfeit a life policy for non-payment of a premium, when such company has in its possession the money of the assured to an amount covering the premium, and which it has the power to apply to its payment."

And in the same case the court say, upon the question of whether the assured consented to such application, "as a matter of fact, the consent of the assured to the application may be presumed; that he would object to it and thereby forfeit his policy is a proposition too absurd to be considered."

We see no reason why the instrument issued to the assured representing his interest in a surplus should not be designated as a bond. The instrument to be issued under the terms of the constitution is twice mentioned in it as a

bond and the paper actually received by the assured is therein spoken of, eight times, as a bond. No additional efficacy is imparted to it by calling it a bond. It provides conditionally for the payment of a sum certain and is under seal. If it were called a *simplex obligatio*, which it is not, it would have no more force than if designated as a paper representing a credit.

Being of the opinion that the bond might have been by the company used in payment of assessments without request of or surrender by the assured, we find that there was no warrant for the forfeiture of the policy. The judgment of the Superior Court is therefore affirmed.

The foregoing is the conclusion of a majority of the court in which the writer of this opinion does not concur; he being of the opinion that the provision in the bond that it should be used in payment of assessments only when surrendered to the company and thus necessarily only upon the application of the assured, without such application and surrender, the company had no right to use it in payment of assessments. The decision of the majority of the court is in effect a holding that all the policies of this very large company, with its thousands of members, are subject to the rule here announced, that the company must in every instance before forfeiture make use of the amount owing upon such bonds in payment of assessments, although they be not surrendered and no request for such application be made. Whether such bonds payable with the policy, or the sums represented by such bonds at the death of the assured belong to the beneficiary named in the policy, or descend to the heirs of the assured, or may be by him devised, is a question not now presented to this court. It is manifest that such bonds, issued as they are to be, each ten years, may in many instances amount to a very considerable sum, nearly, if not quite, equaling the policy itself. If the company as a condition before forfeiture is obliged without request by the assured and without surrender of the bond to apply the credit represented thereby to the payment of assessments, it may, in after time, find itself

seriously involved by contention between the heirs or devisees of persons assured and the beneficiaries named in the policies.

It is not the case that parties holding life insurance policies are never willing to let the forfeiture occur. On the contrary the experience of all life insurance companies is that the great majority of those who take out life policies permit them to lapse and in many cases apply for a surrender. Nor is the question presented in this case, whether the clause in the bond providing that if the policy be forfeited, the bond shall likewise be forfeited and void, is, under the constitution, a valid and binding condition. Nor is such question determined by the judgment in this case. I should be glad to see a way in which, in consistence with the plain and reasonable provisions of the bond that it should be applied in payment of assessments only upon a surrender thereof by the assured, such provision can, under the law, be held to be of no effect, and the judgment in thisc ase affirmed.

---

105 342
r205s 42

The Garden City Sand Company v. American Refuse Crematory Company et al.

1. PRACTICE—*Where the Findings of the Master Are Approved by the Chancellor.*—Where the findings of the master, who saw and heard the witnesses, are approved by the chancellor, this court can not disturb the decree rendered thereon, unless it is found clearly and manifestly against the weight of the evidence.

2. STOCK—*Recital in Certificate that the Stock is "Fully Paid and Non-assessable."*—The recital in the stock certificates that the stock is fully paid and non-assessable, throws upon the corporation the burden of showing that the stock was taken by the defendant with knowledge that such recital was fraudulent. A *bona fide* purchaser for value and without notice, of stock issued by a corporation as paid up, can not be held liable on such stock in any way, either to the corporation or to the creditors or to other persons, even though the stock was not actually paid up as represented; such a purchaser has a right to rely upon the representations of the corporation that the stock is paid up.

3. SAME—*Right of Purchaser to Rely upon Recitals in Certificate.*—Where a statement is made on the face of the certificate that it is

paid-up stock, the *bona fide* purchaser of the certificate need not inquire further, but may rely upon that representation, and is protected thereby against liability.

Bill to Enforce a Stock Liability of Stockholders.—Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge presiding. Heard in this court at the March term, 1902. Affirmed. Opinion filed January 8, 1903.

This was a bill filed by appellant to enforce a stock liability of the shareholders of the American Refuse Crematory Company, an insolvent corporation, appellant being a judgment creditor of the crematory company and the appellees being stockholders of the same.

The bill alleges the obtaining of its judgment by appellant, and the return of execution thereon unsatisfied; and that the crematory company permitted that execution to remain unsatisfied more than ten days after demand; that the stock of the crematory company was $1,000,000, divided into 10,000 shares of the face value of $100 each; that none of the stockholders have paid for their respective shares of stock; that said stock was never fully paid for by any person or persons who may have owned the same previous to the time when appellees, stockholders, became owners; and that the appellees, stockholders, are now indebted to the corporation in the sum of the whole or some large part of the face value of the respective shares of stock; that after the incorporation of the crematory company its directors made a pretended sale of 9,998 shares of the company's stock to one F. C. Rutan, and that said Rutan made a pretended payment for said stock by assigning to the company on April 7, 1894, his interest in a United States patent, No. 516,706, issued March 20, 1894, to William L. Johnson, for a certain invention in garbage crematories; that said Rutan had acquired his interest in said patent by a conveyance of that date from Johnson of a license to manufacture and vend said invention in the United States, except Illinois, during the life of the patent; that the conveyance by Johnson names the consideration thereof as $500 in cash and 500 shares of stock of the crematory company; that

said shares at that time had no cash value and that the mention of $500 was merely a color of consideration, no consideration in fact actually passing; and that "at the time when the defendant stockholders above named received their shares of stock of said crematory company, said defendants, stockholders, knew of the transaction whereby Rutan obtained an interest in the patent of Johnson, and assigned to defendant company said interest and received from said company the 9,998 shares of the capital stock of the company in consideration for the assignment of said interest in said patent; and that each and all of said defendants, stockholders, had notice and knew the fact to be that said 9,998 shares of the stock were so issued to said Rutan by said company, without actual valuable consideration therefor."

Further, the bill charges that if, in fact, $500 in money was paid by said Rutan to Johnson for said interest, that said sum is the only valuable consideration given by Rutan for the shares of stock issued to him by said corporation, and that the transaction between Rutan and the company was fictitious, was in excess of the real value of the interest in the patent, and a fraudulent over-valuation and a fraudulent overcharge for the purpose of preventing creditors of the corporation from collecting their claims against stockholders, and that "said defendants, stockholders, had such knowledge of the fictitious character of said above described sale by said corporation of said shares of stock to Rutan, or had notice of such facts relating to said transaction, as should have put them upon inquiry as to the good faith of such transaction."

The bill then sets up voluntary assignment proceedings in the matter of the crematory company in the County Court, and the sale of all of its physical assets for $250, which was less than sufficient to pay expenses of administration in the County Court. The bill prays for the ascertainment of the amount due the corporation from the stockholders and that they be decreed to pay the amount of complainant's judgment and the claims of other creditors who should come in.

The joint and several answer of appellees fully and explicitly denies all of the allegations of the bill, following in its denial the terms of the bill. It also denies that any of appellees, stockholders, is indebted in any amount whatever to the corporation or to any of the corporate creditors, and denies that any of appellees had any knowledge of any fraudulent over-valuation of property received in exchange for stock by the corporation, and denies they ever had any knowledge that the stock was not in fact fully paid and non-assessable, as it purported to be on its face.

The decree of the court finds, among other things, that the stock of the crematory company was subscribed for as follows: Rutan, 9,998 shares; Walker and Bates, one share each; that the individual appellees are now the owners of shares of stock, designating the amount held by them respectively; that with the exception of ten of the defendants (naming them) and the stock held by Krantrowitz as treasurer, there is no evidence that any of the stock held by the other defendants was ever treasury stock; that as to these ten defendants there is no evidence showing how much treasury stock either or any of them held, or the price they were to pay for the same; that all of said stock certificates contained the provision that they were full paid and not assessable; that except as to the said ten defendants there is no evidence showing whether they did or did not pay for their stock; that Rutan, April 7, 1894, assigned his interest in Johnson patent, relating to garbage crematories, to the company, in consideration of the issue to him of 9,998 shares of its stock; that such patent was not then worth to exceed $50,500; that the valuation at which it was assigned was a fraudulent over-valuation; that Rutan should not be allowed credit therefor on his stock subscription for more than $50,500; and that he is still indebted on such stock in the sum of $949,300; that as to all of appellees except Rutan, the bill is dismissed, but as to him the equities are with complainant, and he, Rutan, is ordered to pay the several claims proved.

From such decree appellant perfected this appeal.

EDWIN C. CRAWFORD, attorney for appellant.

GOODRICH, VINCENT & BRADLEY and MAX PAM, attorneys for appellees; ALBERT M. CROSS, of counsel.

MR. PRESIDING JUSTICE BALL delivered the opinion of the court.

Where the findings of the master, who saw and heard the witnesses, are approved by the chancellor, we can not disturb the decree rendered thereon, unless we find it clearly and manifestly against the weight of the evidence. Hagemann v. Hagemann, 102 Ill. App. 481, and cases cited.

Appellant dealt with the crematory company only when its indebtedness was incurred. Therefore its remedy in the first instance was against the company. When that remedy was found to be insufficient, the right to file the present bill accrued. Whether or not the defendant stockholders are liable thereunder depends upon the allegations of the bill and the proof offered in support thereof.

Appellant alleges that the purchase by Rutan of the 9,998 shares of stock of said company was fraudulent and wholly without consideration; and that the defendants knew or had adequate notice of the fictitious character of such purchase, and therefore knew, or must be held to know, that the stock they received was not fully paid for, and consequently was subject to assessment.

The evidence shows that Rutan subscribed for and there was issued to him all the stock of the crematory company, except two shares. There is no direct evidence that any of his stock went back to the company. The stubs of the certificate book show that all the stock held by the defendants came to them severally from Rutan, and not from the company. The certificates of stock issued to Rutan, and which through him came to the several defendants, stated that the stock was "fully paid and non-assessable." What, if anything, the defendants severally paid Rutan for their stock does not appear in the evidence. Buying the stock, as they did, from him, whether they paid him par, or fifty per cent, or less, for the same, is immaterial, unless it affirmatively appears that they knew, or they had

sufficient notice to impute to them knowledge that Rutan obtained his stock by fraud. It is not asserted that any of the defendants had any direct knowledge of the manner in which Rutan paid for his stock. It is, however, claimed that the books and records of the company showed the character of that purchase and payment, and that the defendants are bound by whatever such books contain in that regard. There is no proof that any of the defendants had actual knowledge of the entries in the books of the company, or that any of them authorized such entries or caused them to be made. Indeed, the fact that they severally bought their stock from Rutan tends to negative such a presumption. The question then arises, does the mere fact that the defendants are stockholders in the company charge them with knowledge of such entries. It will not be contended that appellant stands in a better position as to the adversary use of these entries than would the company, were it here attempting to enforce a liability on such stock as against the defendants. Rudd v. Robinson, 126 N. Y. 113.

But if the theory of appellant is to be regarded as the true one, the books, while they show that Rutan's stock was paid for by the assignment of the patent, do not show that such patent was over-valued. So that one without knowledge of the circumstances, by the reading of that entry in such books, would not be informed, nor would he have notice of the perpetration of any fraud in that particular.

The recital in the stock certificates that the stock was "fully paid and non-assessable," throws upon appellant the burden of showing that the stock was taken by the appellees with knowledge that such recital was fraudulent.

"A *bona fide* purchaser for value and without notice, of stock issued by a corporation as paid up, can not be held liable on such stock in any way, either to the corporation, corporate creditors or to other persons, even though the stock was not actually paid up as represented; such a purchaser has a right to rely upon the representations of the corporation that the stock is paid up. * * * Where,

however, a statement is made on the face of the certificate that it is paid-up stock, the *bona fide* purchaser of the certificate need not inquire further, but may rely upon that representation, and is protected thereby against liability." Cook on Stockholders, Sec. 50.

"A purchaser or assignee of stock which has not been fully paid, does not become liable to the corporate creditors for the unpaid balance where stock has been issued as fully paid, and he has acquired the same in good faith and without notice that it has not been fully paid." Coleman v. Howe, 154 Ill. 458.

Appellant says that the bill alleges appellees paid nothing for their stock, and that as the answer does not deny the same, the allegation stands admitted. Even if this be true, which it is not, it can not benefit appellant until it is re-enforced by evidence showing that appellees purchased their stock from the crematory company. Upon this last point the finding of the master is adverse to appellant, and we can not say that such finding is clearly and manifestly against the weight of the evidence.

The defect in the evidence presented by appellant is its indefiniteness. It shows that ten of the defendants each paid money into the treasury of the crematory company, but there is no showing as to how much, if any, of their respective holdings of stock were treasury stock, or upon what price or terms it was sold to them, or that they severally did not pay in full for all the treasury stock which they received. Nor does it appear, except by inference and upon presumption, that the crematory company ever had any treasury stock, while there is evidence tending to support the finding of the master that the company was never the owner of any stock.

The master found, and the court below, by its decree, approved the finding, that none of the appellees, other than Rutan, knew there was any fraudulent over-valuation of the patent, and that they had no knowledge (barring Rutan) when they took their stock, that the same was not fully paid and non-assessable.

We think that such finding is justified by the evidence, and we therefore affirm the decree of the Superior Court.

Charles G. Hutchinson v. Jennie C. Hutchinson.

1. SOLICITORS' FEES—*Court May Form an Independent Judgment as to the Amount.*—The court, in determining the amount of solicitors' fees, may consider its own experience in such matters, in arriving at a conclusion as to what is a usual and customary, as well as reasonable allowance for the fees in question.

Divorce.—Order for solicitors' fees. Appeal from the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge presiding. Heard in this court at the March term, 1902. Affirmed in part and reversed in part. Opinion filed January 8, 1903.

JAMES MAHER and FRANK P. BLAIR, attorneys for appellant.

BANGS, WOOD & BANGS, attorneys for appellee.

MR. JUSTICE WINDES delivered the opinion of the court.

This is an appeal from an order entered by the Circuit Court September 17, 1901, for the solicitors' fees of the appellee for services to be rendered by them on an appeal from this court's judgment affirming a decree of separate maintenance rendered by the Circuit Court in favor of appellee and against appellant. The allowance is $2,000.

Appellee made two motions to dismiss this appeal, which were reserved to the hearing. The first motion was to dismiss it because the appeal bond was not filed within the time allowed by the Circuit Court for filing the same. A cross-motion suggesting diminution of the record and asking leave to supply the same was made, and an additional record presented, which appellant asks leave to file. The additional record shows that the appeal bond was filed within the time allowed by the Circuit Court. The cross-motion is therefore allowed; the clerk will file the additional record, and the motion to dismiss the appeal is denied.

The other motion made by appellee to dismiss the appeal, is for the alleged reason that it fails to appear by the record that the appeal bond filed in the Circuit Court was ever approved by that court. The appeal bond is indorsed

as follows: "Approved, Edmund W. Burke, Judge," with a date corresponding to the date of the filing of the bond. For the reasons stated in our opinion this day filed in three other appeals between the same parties, this motion to dismiss this appeal is denied.

The record shows that appellee moved the court for an allowance for the solicitors' fees in question, and in support of the motion presented two affidavits, one of an attorney who stated that he was familiar with the issues and character of the case and the work involved in presenting it to the Supreme Court, and that $2,000 was a fair and reasonable, usual and customary fee for appellee's solicitors in the Supreme Court; the other being the affidavit of the appellee herself that appellant was worth $500,000 and in receipt of an annual income of more than $16,000. Opposed to these affidavits there was one by the appellant that his property was not worth in the market more than $250,000; that a great portion of it was unimproved and yielded no income; that he was at heavy expense to take care of it, and that his annual income did not exceed the sum of $10,000.

On a further hearing of the motion the affidavits of four practicing attorneys at the bar of Cook County were read on behalf of appellant in opposition to the motion, to the effect, in substance, that the reasonable, customary and usual fees of appellee's solicitors for services in the Supreme Court in defending the appeal were worth not to exceed $750, one of the affidavits placing the amount at $350 to $500, one at $500 to $600, and another at $500 to $700. It appears that these affidavits were based upon the fact that the question at issue in the Supreme Court was a common law marriage, and that there was to be an oral argument in the case upon behalf of appellee; that these attorneys had explained to them the history of the case as presented in the Circuit and Appellate Courts, and that the solicitors' fees for services in those courts had been paid.

Still later, on a further hearing of the motion, appellee presented three additional affidavits of lawyers in active

practice at the Chicago bar, who, in substance, stated that they were familiar with the character and issues of the case in the Supreme Court, and that a fair and reasonable, usual and customary fee for appellee's solicitors for presenting the case to that court was, in their opinion, $2,000.

It further appears from the record, though only by inference from the abstract, that appellee's solicitors were allowed and paid—no objection being made to such allowance by appellant—for services in presenting the case to the Appellate Court on appeal from the Circuit Court, the sum of $1,000, and that the same solicitors who appeared for appellee in both the Circuit and Appellate Courts were to represent the appellee in the Supreme Court.

It further appears by statements made upon the hearing by the chancellor, that he would have been well satisfied in allowing for services for appellee's solicitors in the Supreme Court the sum of $1,500, and seems to have been of the opinion that he might make an allowance that was not "unreasonable." We think the duty of the chancellor was to make an allowance based upon what was the usual and customary, as well as reasonable charges of solicitors at the Chicago bar for like services, and that he should not have been controlled entirely by the affidavits of the several solicitors in support of the motion. The chancellor had the right to consider his experience, and this court, in reviewing the order, may consider its own experience in such matters, in arriving at a conclusion as to what was a usual and customary as well as reasonable allowance for the fees in question. Metheny v. Bohn, 164 Ill. 495–8; McMannomy v. R. R. Co., 167 Ill. 497–510.

In the Metheny case the court, in passing upon the question of solicitors' fees, state the rule and duty of the chancellor to be to "exercise his own judgment and not be wholly governed by the opinions of attorneys as to the value of their services," and also say that the chancellor has the requisite skill and knowledge to form some idea as to what is a fair and reasonable compensation, and while he should consider the opinions of witnesses and evidence

of the sum usually charged and paid for such services, he should, at the same time, exercise his own judgment.

In the McMannomy case there is quite a full discussion of this subject, and the court say: "While opinions are receivable and entitled to due weight, the courts are also well qualified to form an independent judgment on such questions, and it is their duty to do so;" and held that while the opinions of solicitors as to what was reasonable and proper were sufficient to justify the allowance made by the court, the other evidence in the case more nearly agreed with the court's judgment as to the usual charge and true value of the services rendered and in question. The court accordingly reduced an allowance of $85,000 to $50,000. The different opinions of solicitors in that case ranged from $25,000 to $150,000.

So here, while the affidavits on behalf of the appellee as to what was a usual, customary and reasonable charge would justify the allowance made by the chancellor, from the whole evidence, considered in the light of our experience as to such matters, we think that an allowance of $1,000 more nearly accords with equity, as well as with our judgment as to what is a usual, customary and reasonable fee for like services as those to be rendered by appellee's solicitors. We are mainly influenced in reaching this conclusion by the fact that appellee's solicitors represented her in this court, on the appeal of the case to this court, for which they were allowed and paid $1,000, and necessarily in representing the appellee in both the Circuit and the Appellate Courts they became familiar with all the facts and questions in the case, and their services could not be worth more in the Supreme Court than in this court.

The order is therefore affirmed as to $1,000 and reversed as to the remainder. Appellant will pay the costs of this court.

Affirmed in part and reversed in part.

105 353
a204s 378

City of Chicago v. Charles E. Cook.

1. PRACTICE—*Filing Additional Plea—Statute of Limitations.*—Where, after the trial has begun, defendant's attorney moves the court for leave to file a plea of the statute of limitations, presenting such a plea in writing, but not supported by affidavit or otherwise showing any excuse for not filing the plea earlier, there is no abuse of discretion by the court in overruling the motion.

2. STATUTES—*Sec. 53, Art. 9, of the Municipal Incorporation Law.—Construction of Word "Costs."*—The word "costs," as used in Sec. 53, Art. 9, of the municipal incorporation law, does not include the expense of employing a person to estimate the damage to buildings and other structures by the improvement, for the making of which the supposed prior condemnation proceedings were instituted.

Assumpsit.—Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANECY, Judge presiding. Heard in this court at the March term, 1902. Affirmed. Opinion filed January 8, 1903.

CHARLES M. WALKER, corporation counsel, WILLIAM H. SEXTON, assistant corporation counsel, and WILLIAM H. FITZGERALD, attorneys for appellant; FITZGERALD & ORR, of counsel.

CLARENCE S. DARROW and IRVING W. BAKER, attorneys for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a judgment in favor of appellee and against appellant, for the sum of $5,000, rendered in an action of assumpsit. The plaintiff is a contractor and builder, and was employed by the city in a large number of cases to estimate the damage which would accrue to buildings and structures of private owners, by reason of the taking or damaging of private property, in condemnation proceedings for public improvements, which the defendant, the city, proposed to institute or had instituted; and also to estimate the damages to buildings or other structures belonging to private owners, which had been damaged by the making of public improvements by the city, and in respect to which such owners had sued the city. The evi-

dence for the plaintiff tends to prove that the reasonable value of his services is $6,070.06, and there is no evidence to the contrary. It is not specified as ground for a new trial, nor assigned as error, that the damages are excessive, nor is it contended by appellant's counsel that the employment of appellee was, in any instance, unauthorized, and it is obvious that services such as he rendered are necessary in the class of cases in which he was employed.

The only reasons urged by counsel for appellant for reversal of the judgment are, first, "The verdict and judgment are not supported by the evidence," and second, "The court erred in refusing leave to appellant to file a special plea of the statute of limitations." The suit was commenced June 24, 1897. A bill of particulars was filed June 2, 1898. An amendment thereto was filed October 12, 1898, and a further amendment December 8, 1898. The bill of particulars, as amended, sets forth, by items, and with sufficient particularity, the matters in respect to which appellee claims to have performed the services in question. The trial commenced September 30, 1901. After one witness for the appellee had been examined in chief and cross-examined at considerable length, appellant's attorney moved the court for leave to file a plea of the statute of limitations, presenting such a plea in writing, which motion the court overruled. The motion was not supported by affidavit, or otherwise, showing any excuse for not filing the plea earlier, and there was no abuse of discretion by the court in overruling the motion. Fisher v. Greene, 95 Ill. 94; Dow v. Blake, 148 Ib. 76, 88; Millikin v. Jones, 77 Ib. 372; C. & E. I. R. R. Co. v. O'Connor, 119 Ib. 586, 595.

Counsel for appellant contend that appellee's services were legally payable only from a special fund, and that there is no evidence that there is such fund. This contention is based on the following, which occurred on the trial. Appellant's attorney offered in evidence certain petitions, for the purpose, as he stated, of showing that in cases where the improvements were made by special assessment, the ordinance provided that all costs should be paid out of the

special assessment fund. The court being averse to the admission in evidence of the petitions, it was finally admitted by appellee's attorney that, in each of the so-called assessment cases, the ordinance provided that the whole cost should be paid by special assessment. This admission was, apparently, made with reference to the cases to which the offered petitions referred, and the petitions not being in the record, we have no means of knowing what the cases were. It is manifest from the record that none of the services performed by appellee were performed in strictly special assessment cases. Such of his services as were not performed in suits brought by the owners of property damaged by public improvements, made by the city prior to the performance of appellee's services, must have been performed in condemnation proceedings instituted or contemplated by the city; because in the case of special assessments for the improvement of streets or alleys already opened, damages to buildings or other structures are not contemplated, and therefore no estimate of damages is required. Therefore, by special assessment cases, counsel for appellant doubtless mean cases in which it was provided by ordinance that the compensation awarded in condemnation proceedings for public improvements may be raised by special assessment, as provided by section 53 of article 9 of the municipal incorporation law, which was in force when the services in question were performed. 1 S. & C.'s Stat. 1896, p. 778, paragraph 169. That section authorizes the filing of a supplemental petition, praying the court to cause an assessment to be made for the purpose of raising the amount necessary to pay the compensation and damages awarded for the property taken or damaged, with the costs of the proceeding, etc. The section further provides:

"The said court shall have power, at any time after such supplemental petition shall have been filed, to appoint three commissioners to make such assessment, and to ascertain, as near as may be, the costs incurred to the time of such appointment, and the probable further costs of the proceedings, including therein the estimated costs of making and collecting such assessment, and shall direct such costs to be included by such commissioners in making said assessment."

Appellant's counsel, if we understand them, contend that the costs of a condemnation proceeding include the expense of services such as those performed by appellee; that it must be conclusively presumed that compensation for appellee's services was included in the assessments made on the supplemental petitions, and that he can not recover, except on proof that the special assessments were collected.

We are of opinion that the word "costs," as used in the section, does not include the expense of employing a person to estimate the damage to buildings and other structures by the improvement, for the making of which the supposed prior condemnation proceedings were instituted. By a former city charter the estimate of the expense of an improvement requiring the taking or damaging of private property, was authorized to be assessed against property benefited by the improvement, but the charter was silent as to costs. Tuley's Laws and Ordinances, 1873, p. 440 *et sequens*. The court held that costs could not be assessed; Morris v. City of Chicago, 11 Ill. 650; Canal Trustees v. same, 12 Ib. 403.

These cases clearly distinguish between expenses and costs.

John Adair, who was special assessment attorney for the city from May 1, 1895, till May 1, 1897, testified, in substance:

"The expenses incident to opening these streets and assessing damages were paid by vouchers drawn on what was known as special Fund W. This was a special assessment fund. The expenses of opening streets, etc., were paid by warrants drawn on said Fund W. They did not come out of the general fund. This Fund W was an arbitrary six per cent which was added to all special assessments for the purpose of covering court costs and other incidental expenses, such as witness fees, etc. It was six per cent of the amount of the assessment, whether a special assessment for the purpose of paying for public improvements or any of other divers assessments; whether it was an assessment for the purpose of raising a fund to pay the award in condemnation cases or not. It was not part of the general fund of the city. So that whenever an improve-

ment was made, the first six per cent came out of that for general costs, and as the assessment was collected, six per cent was credited to the fund; and that was designed to pay the expenses of the special assessment bureau and its law department—not the salaries connected with the law department."

The arbitrary addition to assessments of six per cent was an illegal imposition on the owners of the assessed property.

Gosselin, who served eight years, and until about six months before the trial, in the department of public works of the city, as bookkeeper in that department, testified that since 1897 there had been no Fund W, and appellant's counsel contend that the services of appellee were payable out of that fund, and it being exhausted and non-existent, there can be no recovery. We do not find it necessary to discuss this contention, in which we do not concur, because the testimony of Gosselin shows that such services as those rendered by appellee were primarily paid for out of the general fund. Gosselin testified:

"Fund W was made up by an estimated cost of the special assessment improvements to the extent of six per cent, to pay the expenses of the special assessment department, and when collected, this six per cent was transferred by the special assessment department to the general fund, to make good the moneys paid out from it, on account of the expenses paid out to the special assessment department. When money was drawn from the general fund to pay any expenses of the special assessment department, it was transferred back from this six per cent fund to the general fund."

The witness was in charge of the books and kept the accounts in the department of public works, and his evidence conclusively shows that the fund made up of six per cent, arbitrarily added, as the witness Adair testified, to assessments, was not used directly in paying expenses such as were incurred by appellee's employment, but was, when collected, transferred to the general fund to reimburse the latter fund for special assessment expenses paid from it. Counsel for appellant cite numerous authorities to the effect that if a party contracts to be paid from a specified fund,

he must look to that fund for payment. These authorities have no application to the present case. Neither has section 49 of article 9 of the municipal incorporation law any application.

The uncontradicted evidence is that appellee did not agree to look to any particular fund for compensation for his services; that he did not even know from what fund he was to be paid. His contract is an implied one. He was simply requested at different times to do certain work, and he did the work in pursuance of such requests. It is admitted that appellee was entirely competent to do the work which he was requested to do; the uncontradicted evidence is that he did it, and that the value of his services was greater than the amount of the judgment, and we find no reason for supporting the contention of appellant's counsel that he should not be paid. On the contrary we find in the record abundant reason why he should be paid, and the judgment will be affirmed.

Samuel Richardson v. Central Lumber Company.

1. MECHANICS' LIENS—*Statutory Requirements.*—Section 7 of Ch. 82, R. S., as to mechanics' liens, provides in substance that no contractor shall be allowed to enforce a lien as against a purchaser unless, within four months after the last payment under his contract shall have become due and payable, he shall either bring suit to enforce his lien, or shall file with the clerk of the Circuit Court of the county in which the building, erection or other improvement to be charged with the lien is situated, against the owner, a claim for lien verified by the affidavit of himself, agent or employe, which shall consist of a brief statement of the contract, the date the same was made, the date fixed therein, or the time implied, for completion and for final payment, and the date that the same was completed, if completed, the balance due after allowing all credits, and a sufficiently correct description of the lot, lots or tract of land to pass the title thereof by deed or conveyance.

2. SAME—*Where Contract is Verbal.*—Sec. 6 of Ch. 82, R. S., provides that if the work is done or materials are furnished under a verbal contract, no lien shall be had by virtue of this act unless the work shall be done or materials furnished within one year from the date of the contract, and final payment therefor is to be made within such time.

Richardson v. Central Lumber Co.

Mechanic's Lien.—Appeal from the Superior Court of Cook County; the Hon. AXEL CHYTRAUS, Judge presiding. Heard in this court at the March term, 1902. Reversed. Opinion filed January 8, 1903.

Statement.—The appellee Lumber Company made a verbal agreement with Carl and Anna Anderson, January 30, 1899, the then owners of certain real estate described in the bill, to furnish certain lumber and building material for the improvement by said Andersons of their said property. The lumber and materials were furnished as agreed, the first being delivered on the date of the agreement and the last April 5, 1899, were used in improving the premises, and there is due therefor to appellee $631.07.

July 20, 1899, the Andersons conveyed said real estate to the appellant, Richardson, by quit-claim deed, which was recorded July 22, 1899. Thereafter, on April 13, 1900, the bill in this case was filed against Richardson and others, in which the foregoing facts, except the conveyance to Richardson, are alleged, and that Richardson claims some interest in the premises; that appellee filed with the clerk of the Circuit Court on July 22, 1899, a statement of claim for lien, a copy of which was made a part of the bill, from which it appears that "C. C. Wheeler swears that he is agent for the Central Lumber Company; that lumber and building materials were furnished under a verbal contract entered into by and between said company and Anna S. Anderson and Carl G. H. Anderson on or about the 30th day of January, A. D. 1899, in and by which agreement it was agreed that the said Central Lumber Company should furnish and deliver to said Andersons such lumber and building materials as the said Andersons should order for the building mentioned on the property described, and which was to be paid for on the last delivery of the last installment of lumber and building material so delivered and used; that all of said lumber and materials were delivered on the dates and in the amounts as set forth in 'Exhibit A,' and the last installment of lumber and materials was delivered on the 5th day of April, A. D. 1899."

The statement further shows that on a certain exhibit

"A" attached thereto, appeared the prices which were to be charged by appellee for said lumber. No other or further statement of the contract between appellee and the Andersons appears from said statement of claim. A demurrer of Richardson to the bill was overruled and he answered. After issues were made the cause was referred to a master, who took evidence and reported in favor of a lien as claimed by appellee. Thereafter the bill was amended by leave of court by the insertion of the following:

"Orator further represents it was provided in said verbal contract, and was part of same, that orator should furnish such lumber, the delivery to begin immediately, and said deliveries to be completed within three months. Materials were to be paid for within thirty days after expiration of said three months, and buildings were to be finished before May 1, 1899."

A demurrer of Richardson to the bill as amended was overruled, he answered the amended bill, and the cause was again referred to the master, who filed a supplemental report, which shows, among other things, the conveyance of the real estate by the Andersons to Richardson, and recommends that a decree in favor of appellee, allowing its lien, and for a sale of the real estate be entered. A hearing was had on exceptions to the master's supplemental report, which were overruled, the report confirmed and a decree in appellee's favor entered, from which this appeal is taken.

WILLIAM S. NEWBURGER and T. F. MONAHAN, attorneys for appellant.

ELMER H. ADAMS, attorney for appellee.

MR. JUSTICE WINDES delivered the opinion of the court.

It seems necessary to consider only two questions presented by this record, viz.: the sufficiency of the statement of claim for lien filed by appellee in the Circuit Court, and of the contract on which the lien claimed is based. Section 7 of Ch. 82, Hurd's Rev. Stat., as to mechanics' liens, provides in

substance that no contractor shall be allowed to enforce a lien as against a purchaser, unless, within four months after the last payment under his contract shall have become due and payable, he shall either bring suit to enforce his lien, or "shall file with the clerk of the Circuit Court of the county in which the building, erection or other improvement to be charged with the lien is situated, against the owner, a claim for lien verified by the affidavit of himself, agent or employe, which shall consist of a brief statement of the contract, the date the same was made, the date fixed therein, or the time implied, for completion and for final payment, and the date that the same was completed, if completed, the balance due after allowing all credits, and a sufficiently correct description of the lot, lots or tract of land to pass the title thereof by deed of conveyance."

Section 6 of the same act provides as follows:

"If the work is done or materials are furnished under a verbal contract, no lien shall be had by virtue of this act unless the work shall be done or materials furnished within one year from the date of the contract, and final payment therefor is to be made within such time."

The bill in this case was filed more than eleven months after the last material was delivered, according to the evidence and the statement of claim filed in the Circuit Court, and more than ten months after the last payment became due, according to the allegations of the amended bill. Richardson became the purchaser of the premises by deed, which was recorded on July 22, 1899, the same day the statement for claim of lien was filed in the Circuit Court. It was essential, therefore, under the statute quoted, before appellee could have a lien, that he file his statement of claim therefor in accordance with the statute. It fails to appear from the claim for lien which is quoted in the statement preceding this opinion, that any time is named therein when the lumber and material contracted to be furnished and delivered to the Andersons were to be delivered, but only that the last installment thereof was delivered on April 5, 1899; nor does it appear from said claim that any time is shown when the last payment for such lumber and mate-

rial was to be made, except that payment was to be made on the last delivery of the last installment of said lumber and material. Because there is nothing to show when the last delivery of lumber and material was to be made, it follows that there was no time fixed for the last payment. It seems clear, therefore, that the statement of claim for lien is not a compliance with the statute.

If, however, it could be said that the statement of claim does comply with the statute in this regard, there could be no lien under the contract set forth in the statement, for the reason that under section 6, as has been held in the late case of Williams v. Rittenhouse & Embree Co., 198 Ill. 602–10, the contract being a verbal one, there could be no lien unless it provides by its terms that the work should be done or materials furnished within one year from the date of the contract, and final payment therefor should, by the terms of the contract, be provided to be made within the same time. It is clear that the contract set forth in the statement of claim for lien states no time within which the lumber and material were to be delivered, and, as above stated, no time for the making of the last payment therefor. Section 7 of the statute above quoted provides that the claim for lien, among other things, should contain "a brief statement of the contract." Appellant, in purchasing this property, had a right to rely upon the matters stated in this claim for lien, and since it states a contract which would give the appellee no right to a lien, he should be protected therefrom.

Moreover, if we consider the case under the allegations of the amended bill, there could be no lien, because the claim for lien offered in evidence shows an entirely different contract from that alleged in the amended bill.

There being no right of lien in favor of appellee, the decree of the Superior Court is reversed.

105 363
a205s 105

George F. Harding v. Adelaide M. Harding.

1. DIVORCE—*Reversal of Decree of Circuit Court Does Not Affect Order to Pay Solicitors' Fees.*—The reversal and remanding of a divorce decree by the Supreme Court, does not affect the jurisdiction of the Circuit Court to allow solicitors' fees for services in presenting the case on appeal.

Petition for Solicitors' Fees.—Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge presiding. Heard in this court at the March term, 1902. Affirmed in part and reversed in part. Opinion filed January 8, 1903.

WILLIAM J. AMMEN, attorney for appellant.

PECK, MILLER & STARR, attorneys for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court in favor of appellee and against appellant, allowing the former $5,000 as and for her solicitors' fees in two certain appeals from the Circuit Court to this court, and two appeals of the same cases from this court to the Supreme Court, and the further sum of $166.28 on account of certain disbursements alleged to have been made by appellee, or on her account. July 26, 1897, the Circuit Court rendered a decree in the cause of Adelaide M. Harding v. George F. Harding, on a bill filed by the former for separate maintenance, fixing her permanent alimony at the sum of $6,400 per annum, etc., from which decree the appellant, George F. Harding, appealed to this court, where the decree was affirmed (79 Ill. App. 590), and appellant appealed from the judgment of this court to the Supreme Court, and the latter court reduced the alimony to $3,600 per annum. Subsequently to the rendition of the final decree in the Circuit Court, awarding alimony as above stated, that court, in certain contempt proceedings instituted by appellee, found appellant to be in contempt of the court, in disregarding and failing to comply with previous orders of the court awarding temporary alimony to appel-

lee, and adjudged that appellant be committed to the county jail of Cook county until he should pay said temporary alimony, etc. Appellant appealed from that judgment to this court, and, on the judgment being affirmed here (79 Ill. App. 621), he appealed from this court to the Supreme Court, and the latter court affirmed the judgment of this court (180 Ill. 592). The petition in the present case was filed in the Circuit Court while said appeals to the Supreme Court were pending, and prays for the allowance of solicitors' fees for services in the appeals to this and to the Supreme Court. An answer was filed to appellee's petition, and appellant's counsel, in his printed argument, states the issues as follows:

"*The Issues as Presented by said Petition and Answer.*

These issues were:

1. As to what services of solicitors were allowed for in the final decree of July 26, 1897.

2. As to what services were actually performed by the attorneys for appellee subsequent to the decree of July 26, 1897, or not allowed for by that decree.

3. As to what portion of such services actually performed subsequent to said decree, or not allowed for by that decree, were reasonably necessary or proper to be performed in the case by said attorneys.

4. As to what was the reasonable value of such reasonably necessary services actually performed subsequent to said decree, or not allowed for by that decree.

5. As to the liability of defendant to pay the reasonable value of the services last above referred to, in view of all the facts and circumstances in proof, including his own financial condition and also the financial resources of his wife.

6. As to the liability of defendant for disbursements by complainant or her solicitors since the entry of the said final decree of July 26, 1897."

Issue No. 1 is not involved in this appeal. The decree is "for services and disbursements of her solicitors rendered since the entry of said decree of July 26, 1897, herein, and upon appeal by said defendant in the Appellate and Supreme Courts in this case." The language quoted occurs in the preliminary part of the decree, and in the ordering part of the decree the language is referred to thus:

"That said defendant, George F. Harding, do pay unto the said complainant, or to her said solicitors, Miller & Starr, as solicitors' fees herein of said solicitors last mentioned, for and on account of the services herein above mentioned, the sum of five thousand dollars," etc.

No cross-errors are assigned, so that the question whether the court should, or not, have included services of appellee's solicitors claimed to have been rendered prior to July 26, 1897, is not presented by the record.

The main questions in the case are stated in issues 2, 4 and 6, *supra*. The record in the case is exceedingly voluminous, comprising, as it does, not only the pleadings and the testimony of witnesses on the hearing of the petition and the orders in the cause, but a large number of printed exhibits, containing about 3,872 pages, consisting of briefs and abstracts used on the appeals mentioned, and a typewritten copy of the argument of appellee's counsel in the Circuit Court, on the hearing of the cause in which a final decree was rendered July 26, 1897, consisting of 186 pages, the documents making a pile about a foot high. It is obvious from this statement that the evidence can not, in an opinion of reasonable length, be referred to in detail, nor is it necessary. The evidence for the appellee is, that her solicitors were engaged in the performance of services in the appeals to this and the Supreme Court seventy-six and one eighth days, including six and one-half days in court, and that their services were worth $100 per day. Staunton, a witness for appellant, testified that for office work on briefs $15 per day is a usual charge, but on cross-examination he hesitated to testify that he knew the usual and customary charge for such services in the city of Chicago. Aring, a tenant of appellant, and an attorney, testified that, assuming that an attorney had been paid for an original brief, and that the questions discussed in a subsequent brief were substantially the same as in the original, $25 per day would be a reasonable fee for preparing the second brief, assuming further that no new authorities were looked up, and the argument not materially changed. Albert B. Joyner, a clerk in appellant's office, testified that he had

compared the typewritten brief of appellee's solicitors used in the Circuit Court, on the final hearing of the suit for separate maintenance, with the brief of appellee's counsel in this court, and that the latter brief contains two hundred and five and one-half pages of new matter and one hundred and fifty-one and one-half pages of matter contained in the former brief. If the only services rendered for appellee in the appeals were those rendered by her solicitors personally, the amount of $5,000 allowed by the court would be between $65 and $70 per day for seventy-six days' services; but it was proved, on behalf of appellee, that Mr. Hunt, an attorney in the office of appellee's solicitors, and employed by them, performed, under their direction, two and one-eighth days' services in the appeals, and that his services were reasonably worth $12.50 per day; and that Mr. Gram, another attorney in the employ of said counsel, did fifty-six and three-eighths days' work on the appeals, and that his services were reasonably worth from eight to ten dollars per day.

Counsel for appellant, in his argument, says: "A court has a right to judge of the reasonableness of a claim for solicitors' fees, using its own knowledge, as well as the opinion of witnesses," citing cases; and counsel for appellee accede to this proposition. Having carefully considered the evidence in the cause and the arguments of counsel, we can not say that the allowance of $5,000 for the services of appellee's counsel in this and in the Supreme Court is unreasonable or unusual. The contention of appellant's counsel that the Circuit Court had no jurisdiction in the premises, is untenable. The petition was filed in the Circuit Court while the appeals from this to the Supreme Court were pending; the Supreme Court decided the main appeal and remanded the cause to the Circuit Court, with directions. Harding v. Harding, 180 Ill. 481, 524. The Circuit Court, December 8, 1899, entered a decree as directed by the Supreme Court, and in said decree expressly reserved the petition for solicitors' fees. That the court had jurisdiction to proceed in the matter of the petition is sustained by the following

cases: Blake v. Blake, 80 Ill. 523; Jenkins v. Jenkins, 91 Ib. 167.

Appellees claimed and the court allowed $166.28 for disbursements claimed to have been necessarily made on behalf of appellee in the litigation since July 26, 1897, $126 of which was for a supplemental abstract prepared by appellee's solicitors in the appeal to this court. Appellee, by her solicitors, moved the court to tax the expense of the supplemental abstract as costs; but we disallowed the motion to the extent claimed, and allowed it only to the extent of $18.75, which latter sum was taxed as costs against appellant. This was an adjudication of the matter which, until reversed, is binding on the parties. Therefore the sum of $126 for supplemental abstract should not have been allowed. The remainder of the claim for disbursements, viz., $40, is supported by the evidence. The decree will be affirmed for the sum of $5,000, as solicitors' fees, and the sum of $40 for disbursements, being in all, $5,040, and will be reversed as to the sum of $126. Appellant to pay the costs of this and the Circuit Court.

Affirmed in part and reversed in part.

Elsie Johnson v. Elizabeth Mellhousin.

1. COURTS—*Presumptions that Their Proceedings Are Regular.*—The presumption is, in absence of proof to the contrary, that the proceedings of a court of general jurisdiction are regular.

Assumpsit.—Appeal from the Superior Court of Cook County; the Hon. JESSE HOLDOM, Judge presiding. Heard in this court at the March term, 1902. Affirmed. Opinion filed January 8, 1903.

McGLASSON & BEITLER and JAMES R. WARD, attorneys for appellant.

GREGORY, POPPENHUSEN & McNAB, attorneys for appellee; CONRAD H. POPPENHUSEN, of counsel.

MR. PRESIDING JUSTICE BALL delivered the opinion of the court.

Appellant brought suit in assumpsit against appellee. She filed the common money counts and a special count, in which she averred that September 20, 1894, having an interest in certain real estate involved in a foreclosure suit then pending and brought by appellee as complainant, she agreed with, and at the request of, appellee, to refrain from making any defense in such suit, and in consideration of such agreement appellee then and there promised to pay appellant the sum of $1,238.20; that appellant accepted such promise and refrained from making such defense, etc.

The appellee filed the general issue and a plea of the statute of limitations, that the cause of action did not accrue within five years prior to the commencement of the suit. To which last plea there was a replication followed by a rejoinder.

This suit was commenced April 4, 1900. The appellant and her two witnesses testified that the verbal promise set up in the declaration was made in September, 1894, thus clearly establishing the plea of the statute of limitations. Upon such evidence the learned trial judge instructed the jury to find a verdict for the defendant. He was fully justified in so doing.

At the close of appellant's case appellee submitted a motion in writing to instruct the jury to find for the defendant. The court did so. Appellant says that the court gave this instruction orally, and thereby committed reversible error. The record does not state that this instruction was orally given. The Superior Court being a court of general jurisdiction, the presumption, in the absence of proof to the contrary, is that its proceedings were regular. But even if that instruction was given orally, it was but a mere direction to the jury as to how to proceed with their verdict, and was not an instruction to them as to the law of the case. This act did not constitute reversible error. Illinois C. R. R. Co. v. Wheeler, 149 Ill. 525.

The mere fact that the court overruled the motion for a new trial immediately after it was made, and forthwith entered judgment thereon, without an affirmative showing that appellant was injured by such speedy action, is not ground for reversal.

The judgment of the Superior Court is affirmed.

Emil Klicka v. Alvina H. Klicka.

1. PROBATE COURTS — *Appeals from, Are Tried De Novo.*—Section 11 of the act in regard to probate courts authorizes appeal from final orders, judgments and decrees of the Probate Court to the Circuit Court, and provides that upon such appeal the case shall be tried *de novo.*

2. STATUTES—*Section 117, Ch. 3, R. S., Construed.*—Section 117, Ch. 3, R. S., in requiring a refunding bond, applies solely to cases where debts properly payable from the assets of the estate, inventoried or otherwise accounted for by the executor or administrator, may be exhibited within two years from the issuance of letters testamentary or of administration, and properly chargeable to the heirs, devisees or legatees to whom partial distribution may have been made.

3. ADMINISTRATION OF ESTATES—*Refunding Bond After Expiration of Two Years Allowed by Statute for Exhibit of Claims.*—After the two years allowed by the statute for exhibiting claims against the estate has expired, claims are barred, by the express language of the statute, as to all assets inventoried or otherwise accounted for by the executor. Consequently the requiring a refunding bond would be practically useless and of no effect, and the law does not, in such cases, authorize the court to require such bond.

4. SAME—*Refunding Bonds.*—The Circuit Court, on appeal from a judgment of the Probate Court has no more power in the premises than the Probate Court had, but it may not require a refunding bond when the two years provided by the statute has elapsed before the rendition of its judgment.

Probate.—Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge presiding. Heard in this court at the March term, 1902. Affirmed, Opinion filed January 8, 1903.

BULKLEY, GRAY & MORE, attorneys for appellant.

JEROME PROBST, attorney for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

December 20, 1900, the Probate Court of Cook County made the following order:

"In the Matter of the Estate of Joseph Klicka, deceased.

This cause coming on to be heard on the application of Alvina H. Klicka, the widow of Joseph Klicka, deceased, for partial distribution of the assets of the estate of said decedent, and it appearing to the court that said estate is amply solvent, it is ordered that the Equitable Trust Company, executor of the last will and testament of said Joseph Klicka, deceased, make distribution of the sum of one thousand dollars of the funds of said estate to said Alvina H. Klicka on account of her distributive share of said estate upon her giving a proper refunding bond, as required by law," etc.

Emil Klicka appealed from the order.

The Equitable Trust Company, executor of the estate of Joseph Klicka, deceased, filed in the Probate Court, September 27, 1901, its final account as executor, which account was approved by the court October 29, 1901, and Alvina H. Klicka, appellee, appealed from the order approving the account to the Circuit Court. December 31, 1901, both appeals being then pending in the Circuit Court, the appeal of Emil Klicka was reached for hearing, and the court, after hearing the cause, entered an order therein, as on a hearing *de novo*, substantially the same as the order of the Probate Court made on the application of appellee for partial distribution of the assets, except that it contains no provision for a refunding bond. It was admitted on the hearing that appellee is the widow of Joseph Klicka, deceased, and that she renounced the provisions of his will made for her benefit, and elected to take her share of the estate, as allowed by law. There is no controversy between the parties as to the facts, and only two questions, both of law, are presented by the record, namely, the effect of the appeal of appellee from the order of the Probate Court approving the final report of the executor, and the omission from the order of the Circuit Court, in the appeal of Emil

Klicka to that court, of a provision requiring a refunding bond. Section 11 of the act in regard to probate courts, Hurd's Rev. Stat. 1901, p. 571, authorizes appeals from final orders, judgments and decrees of the Probate Court to the Circuit Court, and provides that "upon such appeal the case shall be tried *de novo*." The section, in providing for a trial *de novo* on appeal, is substantially the same as the statute providing for appeals from judgments of justices of the peace, in which latter appeals it has been held that the effect of the appeal is to vacate the judgment of the justice and render it of no effect. Tindall v. Meeker, 1 Scam. 137; Reynolds v. DeGeer, 13 Ill. App. 113, and cases cited.

Appellant's counsel, in support of the objection that the order appealed from does not require a refunding bond, rely on section 117 of chapter 3 of the Revised Statutes, which is as follows:

"Executors and administrators shall not be compelled to pay legatees or distributees until bond and security is given by such legatees or distributees to refund the due proportion of any debt which may afterward appear against the estate, and the costs attending the recovery thereof; such bond shall be made payable to such executor or administrator, and shall be for his indemnity and filed in the court."

This section must be construed together with other sections of the statute relating to the same subject-matter.

Section 70 of chapter 3 provides that all demands against an estate not exhibited within two years from the granting of letters testamentary or of administration shall be forever barred, "unless the creditors shall find other estate of the deceased not mentioned or accounted for by the executor or administrator." In view of this section assets of an estate inventoried, or otherwise accounted for by the executor or administrator, are not liable for claims or demands against the estate not exhibited within the two years mentioned, and, consequently, if such assets have been partially distributed to heirs, or devisees and legatees, as the case may be, those to whom they have been so distributed are not liable for such claims or demands. Manifestly,

then, section 117, in requiring a refunding bond, applies solely to cases where debts properly payable from the assets of the estate, inventoried or otherwise accounted for by the executor or administrator, may be exhibited within two years from the issuance of letters testamentary or of administration, and properly chargeable to the heirs, devisees or legatees to whom partial distribution may have been made. The two years allowed by the statute for exhibiting claims against the estate in question had expired October 29, 1901, when the Probate Court approved the final account of the executor, and when the Circuit Court entered the order appealed from. Claims, if any, brought after that date are barred, by the express language of the statute, as to all assets inventoried or otherwise accounted for by the executor. Consequently the requiring a refunding bond would have been practically useless and of no effect. The law does not, in such case, authorize the court to require such bond. Appellant's counsel cite cases in support of the proposition that the Circuit Court could exercise only such power as the Probate Court could have exercised. When the latter court made an order for partial distribution, two years after the issuance of letters testamentary had not expired. Therefore, that court properly required a refunding bond, as claims not then exhibited might be exhibited within the two years. But when the Circuit Court entered the order appealed from, the two years had expired, and a refunding order was unnecessary. We can conceive of circumstances in which the Probate Court might enter an order for partial distribution after the expiration of the two years, and in such case that court, like the Circuit Court in the present case, would not be warranted by law in requiring a refunding bond. The Circuit Court, on appeal from the judgment of a justice of the peace for a claim on which interest is payable, although it has no more power in the premises then the justice had, may lawfully allow interest till the date of the judgment, notwithstanding the justice could only allow interest to the date of the rendition of judgment in the justice's court. Mitcheltree v. Sparks, 1 Scam. 198.

Had the Probate Court made the order at the date of the order of the Circuit Court it might have omitted requirement of a refunding bond, as did the Circuit Court.

The order appealed from will be affirmed.

Bank of Montreal v. Charles Waite et al.*

105 373
f105 *386

1. BOARD OF TRADE—*Power of Courts to Review Finding of the Board of Directors.*—The courts have nothing to do with the question whether a judgment of the board of directors of the board of trade is correct, or whether the evidence before the board of directors is sufficient to authorize its finding.

2. EQUITY—*Will Restrain One Who Seeks to Avail Himself of a Crime.*—Equity will restrain one who seeks to avail himself of a crime and thereby to deprive another of his property. This is true whether he or another has committed the crime by which he attempts to benefit himself.

3. FRAUD—*Destructive Effect upon a Contract.*—The destructive effect of fraud upon any contract, conveyance, or other transaction, is so essential and far reaching, that no person, however free from any participation in the fraud, can avail himself of what has been obtained by the fraud of another, unless he is not only innocent, but has given some valuable consideration. The remedy which equity gives to the defrauded person is most extensive. It reaches all those who were actually concerned in the fraud and all who directly and knowingly participated in its fruits.

4. SAME—*Concurrent Jurisdiction of Equity and Law.*—Courts of equity have concurrent jurisdiction with courts of law on questions of fraud.

5. BY-LAWS—*Must Be Authorized by Charter.*—A by-law of a corporation to be valid must be authorized by its charter.

6. SAME—*Section 6 of Rule 20 of the Board of Trade Illegal.*—So far as section 6 of rule 20 of the by-laws of the board of trade requires compulsory submission of property rights, the corporation had no right to adopt it, as the general assembly did not grant it that power.

7. CORPORATIONS—*What Powers Are Conferred by Charter.*—Only those powers are given to a corporation by its charter as are given in express words or by necessary implication. The charter of a corporation, read in the light of any general laws which are applicable, is the

*One of several cases involving the same question. The cases were argued together, and briefs submitted in the others were all considered in this one.

measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental.

Bill for an Injunction.—Appeal from an interlocutory order of the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge presiding. Heard in this court at the October term, 1902. Affirmed. Opinion filed January 8, 1903.

This is an appeal from an interlocutory order of injunction, upon bill filed by appellees, the material parts of which are as follows:

The appellees, Charles Waite and Robert H. Thorburn, doing business as Waite, Thorburn & Co., being members of the board of trade of Chicago, allege that they had sold on the board of trade to the defendant, C. H. Canby & Co., 20,000 bushels of standard oats at thirty-seven cents a bushel and 30,000 bushels at thirty-seven and one-fourth cents a bushel, to be delivered in July, 1902; that during the month of July a corner or combination and conspiracy to raise the price of said oats was formed by Bartlett, Frazier & Co., Carrington, Patten & Co., James A. Patten, and other members of the board of trade; that said corner and conspiracy to raise the price of oats, a staple article of commerce in necessary use throughout the United States of America, was a combination in restraint of trade and void; that the said corner caused the price of said oats on the board of trade to be as high as seventy cents per bushel during part of July, 1902. and sixty-four cents on July 31, 1902, which price of sixty-four cents a bushel was the settling price for said oats on the board of trade on July 31, 1902; that sixty-four cents a bushel for standard oats was established as the settling price on said board of trade solely as a result of said illegal corner, and that said price of sixty-four cents a bushel was not the legitimate or reasonable market price of said oats upon said last date, but that the legitimate and reasonable value was not to exceed thirty-eight cents per bushel; that the price of sixty-four cents a bushel for said standard oats is an exorbitant and unconscionable price, established only by said illegal corner; that appellees were unable to comply with their contract,

but defaulted in said contract and failed to deliver any part of the 50,000 bushels of oats agreed to be delivered to C. H. Canby & Co., on or before July 31, 1902; that thereupon the defendants, Canby & Co., under the rules of the board of trade in reference to settlements, elected to require appellees, Waite, Thorburn & Co., to settle said contract at the average market price of said oats on the board of trade on July 31, 1902, the last day on which the oats could have been delivered under the contract, which price was the alleged exorbitant and unconscionable price of sixty-four cents a bushel; that appellees offer to pay to the defendants, Canby & Co., the legitimate, reasonable or actual value of said 50,000 bushels of oats on July 31, 1902, or they offer to deliver said standard oats in kind and bulk, according to said contract, which tender and offer of the oats and the actual or reasonable value of said oats Canby & Co. refused to accept, but demand and claim they are entitled under the rules of the board of trade to settle on the unconscionable and unreasonable price of sixty-four cents a bushel.

The bill sets out the rules of the board of trade, which provide how a committee of three members of the board may determine matters in dispute in reference to deposits made as security for such contracts as that set forth in the bill; that such dispute shall be submitted to said committee of three upon the application of either party to such contract, and that such application may be made in case of failure to settle such dispute as to deposits within three days after the maturity of all contracts upon which the deposit is applicable; no application was made by either party to the contract for the appointment of such committee; that the rule of the board of trade which provides that the purchaser may require of a seller a settlement at the average market price on said board of trade is a rule contrary to public policy and void, in so far as it compels a settlement of contracts at fictitious prices established by an illegal combination or corner in restraint of trade; appellees offer to settle on the actual value of oats on July 31, 1902, to be determined by the court, and which they

claim is thirty-eight cents a bushel, instead of sixty-four cents a bushel, which they allege to be a fictitious price.

The bill further sets out the rules of the board of trade requiring parties to contracts to make certain deposits with the treasurer of the board of trade or with some bank authorized by the directors of the board to receive such deposits as security for such contracts; that appellees deposited margins with this appellant Bank of Montreal as security for their contracts with Canby & Co., for which this appellant issued its certificates for such margins so deposited, payable under the rules of the board of trade; that the president of the board of trade and said Bank of Montreal, and each of them, threaten to indorse said margin certificates to the defendants; and appellees fear he or it will do so unless restrained therefrom.

It further appears from the bill of complaint that appellees did not indorse said certificates so that Canby & Co. could take down the money deposited in escrow with this appellant, but before said margins so held in escrow could be paid to Canby & Co. under the indorsement of the president of the board of trade, and before either appellees or Canby & Co. had made application for the appointment of a committee under the provisions of rule 20, section 6, appellees filed their bill for an accounting and injunction in the Superior Court of Cook County.

The bill of complaint names as defendants, Caleb H. Canby, Uriah R. Denniston and Charles W. Gillette, doing business as C. H. Canby & Co.; William S. Warren, president of the Board of Trade of the city of Chicago, and the Bank of Montreal.

Appellees offer to do equity, and pray (among other things) for an accounting, that defendants may be enjoined from taking any steps to enforce their said claims against appellees, and from indorsing down the margin certificates, and that the president of the board be enjoined from indorsing or turning over said certificates, and that the bank be enjoined from indorsing or otherwise transferring or paying said certificates, or the money represented thereby. They also pray for a writ of injunction, as above set forth.

Upon the verified bill and accompanying affidavits the court granted a temporary injunction as to all the defendants. A motion was made to dissolve this injunction. The court, upon the hearing of such motion, entered an order of injunction against the Bank of Montreal only, in the following words:

"It is therefore ordered that an injunction issue restraining the said defendant Bank of Montreal from indorsing or otherwise transferring or paying said complainants' margin certificates or money represented thereby, or any part thereof, to said Caleb H. Canby, Uriah R. Denniston and Charles W. Gillette, defendants, or either of them, their agents, attorneys or assigns, until further order of this court."

From this interlocutory order the Bank of Montreal perfected this appeal, and assigned the following errors:

"1. The court erred in entering the interlocutory order of August 4, 1902, ordering an injunction writ to issue against the said Bank of Montreal.

2. The court erred in taking jurisdiction of the persons and subject-matter in said bill.

3. Because the complainants below have not made or stated such a cause as entitled them in a court of equity to any recovery or relief from or against this appellant touching the matters contained in said bill, or any of such matters."

HENRY S. ROBBINS, JOHN S. GOODWIN, WALTER D. HAWK, GEORGE P. MERRICK and JAMES E. MUNROE, attorneys for appellant.

LYNDEN EVANS, SEARS, MEAGHER & WHITNEY, COLIN C. H. FYFFE and ROSWELL B. MASON, attorneys for appellees; NATHANIEL C. SEARS of counsel.

MR. PRESIDING JUSTICE BALL delivered the opinion of the court.

Appellees have invoked the aid of a court of equity to restrain the Bank of Montreal from paying over to the defendants, Canby & Co., moneys deposited in that bank by appellees under the rules of the board of trade as margins

upon certain purchases of grain made by appellees upon said board, from Canby & Co. The certificates issued upon such deposits are in duplicate, and by the terms thereof the moneys represented thereby are to be paid out upon the indorsement of the certificates by both depositor and depositee, or on the order of the president of the board of trade indorsed upon either the original or duplicate certificate, "as provided by the rules of said board." The facts set up in the bill of complaint are admitted to be true for the purposes of this hearing. The bill alleges, in substance, that appellees sold on the board of trade to Canby & Co., 20,000 bushels of oats at thirty-seven cents a bushel, and 30,000 bushels of oats at thirty-seven and one-fourth cents for July, 1902, delivery; that during the month of July, 1902, there was "a corner" on the board of trade in oats, by which the price of oats for July, 1902, delivery was run up and fixed at the exorbitant and fictitious price of sixty-four cents per bushel, while the actual market value of oats for that month did not exceed thirty-eight cents per bushel; that appellees had margined their said trades by deposits in the Bank of Montreal, pursuant to the rules of the board, and the defendants were about to pay out and to receive said margins in settlement of such sales at the exorbitant and fictitious price of sixty-four cents per bushel. Appellees pray the court to take control of this fund, and to prevent it being so applied; they also pray for an accounting, and offer to do and perform whatever equity may require.

The real matter here in dispute is the ownership of this fund. The bank can not safely pay out this fund, which it holds in escrow, unless, first, both parties to the certificate indorse it; or, second, the president of the board of trade indorses it; or, third, the bank pays it out under the decree of a court having jurisdiction of the subject-matter and of the persons interested in the escrow fund. The first has not been done; the bill claims, in effect, that the president of the board, without the consent of the parties to the certificates, has no power to do the second; and hence, if the bank desires to avoid the danger of a double liability,

it must wait the action of the court. It follows the bank has such an interest in the subject-matter of this suit, that it had the right to take and to perfect this appeal.

Appellant says that appellees have an adequate remedy at law, and therefore they are not entitled to equitable relief. We do not think that this contention is well founded. Had appellees indorsed the certificates they could not thereafter successfully maintain an action at law against the bank, since the production of the indorsed certificates would defeat them. Nor would their position as against the bank have been any stronger had they suffered the president of the board to indorse the certificates. They would be met by that indorsement, which is duly authorized by the face of the certificates.

Would appellees be in any better position in a suit at law against Canby & Co. after the latter had drawn down this money in either of the ways provided? We think not. In any suit at law against either the bank or against Canby & Co., appellees would be met and overthrown by the strict terms of their contract.

On the other hand, if appellees submit their contention to a committee of the board, and that tribunal proceeds regularly, but finds and fixes the price of settlement at the "cornered" price and not at the actual price, they would be remediless under the law as laid down in Board of Trade v. Nelson, 162 Ill. 431, where the court say:

"Whether the evidence before the board of directors was sufficient to authorize its finding, can not be examined into by the courts. The relator stands convinced by the sentence of a tribunal of his own choice. With the question whether that judgment was correct upon the facts, the courts have nothing to do."

We do not think that appellees have an adequate remedy at law. Their remedy in that court is not plain and adequate. 11 A. & E. Ency. (2d Ed.) 200, and cases cited.

The running of the corner on the board of trade, by which the exorbitant and fictitious price of sixty-four cents per bushel was fixed for oats, when the reasonable and actual price of that grain was then but thirty-eight cents

per bushel, was a violation of the criminal statute. One who seeks to avail himself of a crime and thereby to deprive another of his property, will be restrained in equity. This is true, whether he or another committed the crime by which he attempts to benefit himself. Farmers' & D. Ins. Co. v. German I. C., 79 Ky. 598. In such a case the legal rights of the complainant have been changed by fraud.

"The destructive effect of fraud upon any contract, conveyance, or other transaction, is so essential and far reaching, that no person, however free from any participation in the fraud, can avail himself of what has been obtained by the fraud of another, unless he is not only innocent, but has given some valuable consideration." 2 Pomeroy's Jurisp. (2d Ed.), Sec. 699.

See, also, Sec. 918, where the author lays down the following proposition:

"The remedy which equity gives to the defrauded person is most extensive. It reaches all those who were actually concerned in the fraud, all who directly and knowingly participated in its fruits," etc.

It is a familiar rule that courts of equity have concurrent jurisdiction with courts of law on questions of fraud. Grand Tower v. Walton, 150 Ill. 436.

We are of the opinion that the question as to the jurisdiction of a court of equity in a case like the one at bar is settled in this state.

In Ryan v. Cudahy, 157 Ill. 108, Ryan alleged in his bill the existence of a corner on the board of trade in short ribs during October, 1892, by which the price of that commodity was run up to $12 per hundred pounds, when the actual market value and price was but $7.60 per hundred; that he had made large sales of short ribs for October, 1892, delivery, and was unable to deliver on such sales except at such exorbitant price, because of such corner; that under the rules of the board he had made margin deposits upon such trades; that disputes having arisen between him and the defendants, Roloson & Co., concerning such differences, both parties had appeared before a committee appointed under section 6 of rule 20 of the board of trade, before

whom he, Ryan, offered to prove the legitimate market value of short ribs deliverable October 31, 1892; but all such offers of proof were rejected and were not considered by the committee; that the committee decided the margin deposits were payable to Roloson & Co. and that unless enjoined the defendants would so pay over such money. An *ex parte* temporary injunction was granted. The defendants demurred to the bill, which demurrer the court sustained and dismissed the bill. Ryan appealed.

Appellee contended that a court of equity had no jurisdiction to interfere with action of the board, or of its committees, citing People ex rel. Page v. Board of Trade, 45 Ill. 112; Fisher v. same, 80 Ill. 85, People ex rel. Rice v. same, 80 Ill. 134; Baxter v. same, 83 Ill. 146; Sturges v. same, 86 Ill. 441; and Pitcher v. same, 121 Ill. 412. The court admits that

"Language may have been used in some of the cases cited which might, without a close investigation of the questions involved in the cases, lead to the conclusion reached by counsel. But upon a careful consideration of the questions involved and decided in each case, it will be found that the question presented by this record did not arise in those cases and was not decided."

The court then states and differentiates each of these cases. Its conclusion is:

"If the allegations of complainant's bill are true—and they are admitted to be true by the demurrer—we are inclined to the opinion that he has made a case by his bill which entitled him to relief."

In the Ryan case the jurisdiction of the court was based upon the fact that the board turned him away without a proper hearing. In the bill at bar the jurisdiction of a court of equity arises from the fact that the defendants are about to dispose of the margin money in dispute, to the detriment of appellees, upon an exorbitant and fictitious price created by a corner, and under a by-law which, in that regard, is invalid.

After fully considering the whole case we are satisfied that a court of equity has jurisdiction of the matters here involved.

It is provided in the charter of the board of trade, by *section one*, that they may "make such rules, regulations and by-laws from time to time as they may think proper or necessary for the government of the corporation hereby created, not contrary to the laws of the land," and by *section four*, "The said corporation is hereby authorized to establish such rules, regulations and by-laws for the management of their business, and the mode in which it shall be transacted, as they may think proper," and by *section six*, "Said corporation shall have the right to admit or expel such persons as they may see fit, in manner to be prescribed by the rules, regulations and by-laws thereof." By *section seven* it is granted power to appoint committees "for the settlement of such matters of difference as may be voluntarily submitted for arbitration" by its members; and *section eight* gives to the final award upon such submission the force and effect of a judgment of a court of law.

Under these powers and other powers contained in such charter, and for the purpose of carrying them into effect, the board of trade adopted certain rules and by-laws which were in force May 15, 1902, and have ever since remained in force.

We do not wish to be understood as intending to interfere with the disciplinary powers of the board of trade. With the exercise of such powers we are not concerned. The corporation is the only tribunal having the right to decide whom it will admit to and whom it will expel from its membership. It has full and exclusive power to discipline its members, free from the interference of any court, so long as in so doing it obeys its own lawful rules and regulations. Ryan v. Board of Trade, *supra*.

The right of the corporation under section seven of its charter to appoint a committee which sits as a court, with the right to administer oaths and to compel the attendance of witnesses, and whose final award has the force and effect of the judgment of a court of law, in such matters of difference as are voluntarily submitted to them, is not here in issue. It is well that one who stands convicted by a

tribunal of his own choice, should be estopped from questioning its judgment. Board of Trade v. Nelson, *supra.*

The only one of these rules or by-laws with which we are directly concerned in this case is rule 20, relating to "Deposits to secure the fulfillment of time contracts." These deposits were made by appellees and are held by the appellant bank. Section 6 of rule 20, in part, reads as follows:

"Sec. 6. Upon the fulfillment or settlement of any contract, or upon the closing of any contract under the provision of section 5 of this rule, deposits upon which have been made, and when the full adjustment of all differences relating to the same shall have been effected, the deposits shall thereupon be payable to the party depositing the same; and the joint indorsement of both parties upon the certificate shall be a sufficient authority to the party holding the deposit to pay the same to the holder of the certificate; or in case of a failure between the contracting parties to adjust and settle their respective claims upon the deposit within three (3) business days after the maturity of all contracts upon which the deposit is applicable, the matter in dispute shall, upon the application of either party to such contract, be submitted to a select committee of three disinterested persons, members of the association, to be appointed by the president, which committee shall, without unnecessary delay, summon the party before them, and hear such evidence under oath as either may wish to submit touching their claims to the deposit, and shall by a majority vote decide and report to the president of the board, in writing, in what manner and to whom the deposit is payable, either wholly or in part; whereupon the president shall indorse on either the original or duplicate certificate an order for the payment of such deposits in accordance with the decision of said committee, and such order shall be a sufficient warranty to the party holding the deposit to pay the same in accordance with such order."

If it is in the power of the board of trade to enact and to enforce the part of this section above quoted, then the injunctional order of the court below must be reversed. On the other hand, if the corporation lacks such power, either because it is not granted by the charter, or because the exercise of such power is contrary to the law of the

land, then the order of the learned chancellor must be affirmed. A by-law of a corporation to be valid must be authorized by its charter. Section 7 of the charter does not give the corporation the power to pass section 6 of rule 20, because said section 7 relates solely to the determination of matters that are voluntarily submitted to the committee for decision. This section 7 is the only section of the charter that in direct terms gives any effective power of arbitration to the corporation. Nowhere in the charter is the power given, in express words or by necessary implication, to the board to pass upon the property rights of its members without their consent. Under the settled rules of construction of corporate powers, only those powers are conferred as are given in express words or by necessary implication.

"The charter of a corporation read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental." Central Tr. Co. v. Pullman P. C. Co., 139 U. S. 24; cited and adopted in Nat'l H. B. Ass'n v. Bank, 181 Ill. 41.

So far as section 6 of rule 20 requires compulsory submission of property rights, the corporation had no right to adopt it, for the General Assembly did not grant it that power.

Appellees having come into court praying for the ascertainment and protection of their property rights, and the court being the only body that can pass upon the questions here involved, the decree of the court below is right and should be affirmed.

MR. JUSTICE ADAMS: I concur in the decision in this cause, for the reasons that the case stated in the bill is within the jurisdiction of a court of equity; because the interposition of the court by temporary injunction is, in view of the facts stated in the bill, necessary to preserve appellees' rights; and because there is a dispute between the appellees and Canby & Co. in reference to their claims, respectively, to the deposit with appellant, evidenced by the

certificate of deposit, which dispute the board of trade can not, by its charter, determine against the will of one of the defendants, or otherwise than by their joint submission of such dispute to arbitration, as provided by section 7 of the charter of the board.

Alton Grain Company v. J. Henry Norton.

Bill for an Injunction.—Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge presiding. Heard in this court at the October term, 1902. Reversed in part and affirmed in part. Opinion filed January 8, 1903.

JAMES E. MUNROE, attorney for appellant.

CUSTER, GODDARD & GRIFFIN, attorneys for appellee.

MR. PRESIDING JUSTICE BALL delivered the opinion of the court.

The injunctional decree rendered herein is reversed, in so far as it enjoins the defendant, the Alton Grain Company, from preferring any charges against the complainant, J. Henry Norton, before the directors of said board of trade for failure upon his part to carry out the terms of his contract for the delivery of contract or standard oats to the said defendant during the month of July, 1902, and from preferring any charges against the said J. Henry Norton before the board of directors of the board of trade for the purpose of disciplining him, or in anywise calling him to account for his failure or alleged failure to carry out the terms of said contract for the delivery of contract or standard oats to the defendant during the month of July, 1902.

The remainder of said injunctional order is hereby affirmed.

The decision of this case, in so far as the interlocutory

decree is affirmed, is controlled by the opinion filed in Bank of Montreal v. Waite, *supra*.

MR. JUSTICE ADAMS: I concur in the decision, except in so far as it reverses part of the order of the Superior Court.

---

105 386
r209s 504

Mary A. McMullen et al. v. Frank P. Reynolds.

1. STATUTES—*Section 40, Chapter 106, R. S., Construed.*—Section 40, chapter 106, R. S., should be construed as meaning that a defense, valid and substantial in character, made in good faith and on reasonable grounds, should exempt a defendant from paying a solicitor of his adversary, not for services rendered to him, but for a hostile attack upon what he in good faith believes to be his substantial right.

2. SOLICITORS' FEES—*In Partition Proceeding—Defense Required to Prevent the Apportionment of Costs.*—With reference to making allowance for solicitors' fees in a partition proceeding, the substantial defense required to prevent the apportionment of costs, including attorneys fees, must, first, be made in good faith, though not necessarily successful; second, must be substantial; third, must not be made where it is unnecessary for defendants or any of them to employ counsel to protect their interests in the land sought to be partitioned.

3. SAME—*What the Court May Take into Consideration in Determining.*—In determining the amount of solicitors' fees, the court should take into consideration the personal skill and standing of the lawyer, his experience, the nature of the controversy both in regard to the amount involved and the character and nature of the questions raised in the case, as well as the result.

4. SAME—*Decree May be Entered in Favor of the Solicitor Not a Party to the Suit.*—It is entirely regular and proper to enter a decree for solicitors' fees in favor of a solicitor who is not a party to the suit.

Bill for Partition.—Appeal from the Circuit Court of Cook County; the Hon. EDWARD P. VAIL, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Affirmed. Opinion filed January 16, 1903.

YOUNG, MAKEEL, BRADLEY & FRANK, attorneys for appellants.

WILLIAM SLACK, attorney for appellee.

MR. JUSTICE BURKE delivered the opinion of the court.

This was a suit for the partition of real estate and the only contest was over that part of the decree apportioning solicitors' fees. The statute provides that in all such cases "when the rights and interests of all the parties in interest are properly set forth in the petition, the court shall apportion the costs, including the reasonable solicitors' fees, among the parties in interest in the suit, so that each party shall pay his or her equitable portion thereof, unless the defendants or some one of them shall interpose a good and substantial defense to said petition." Section 40, chapter 106 of the Revised Statutes.

In Metheny v. Bohn, 164 Ill. 495, the court say:

"By the statute, the court is directed to apportion the fees when the rights and interests of all the parties in interest are properly set forth, unless some defendant shall interpose a good and substantial defense to the bill and petition. To such a bill no defense can be successful; and to say that defendant should pay complainant's solicitor unless he succeeded in an impossible defense, would be absurd."

The court held that the statute should be construed as meaning that a defense, valid and substantial in character, made in good faith and on reasonable grounds, should exempt a defendant from paying a solicitor of his adversary, not for services rendered to him, but for a hostile attack upon what he in good faith believes to be his substantial right.

In Walker v. Tink, 159 Ill. 323, a solicitor's fee was allowed, but no good or substantial defense was even alleged. In Hartwell v. DeVault, 159 Ill. 325, the names and interests of all the parties were not stated in the original bill, and the proceeding was hotly contested with the result that the court refused an allowance of a solicitor's fee. To the same effect is Stunz v. Stunz, 131 Ill. 210. In Dunn v. Berkshire, 175 Ill. 243, it is said:

"Where defense in a proceeding for partition is substantial and not frivolous, it is not the intention of the legislature that the defendant should be compelled to bear any portion of opposite parties' solicitors' fees."

In that case, the defense interposed resulted in the decree complained of by the party filing the bill and in such a case solicitor's fees are not proper to be allowed to the complainant's solicitor. In Habberton v. Habberton, 156 Ill. 444, complainant failed in his original bill to set forth correctly the rights and interests of the different owners of the lands, but this defect was obviated by an amendment of the bill. An answer was prepared and filed for the purpose of correcting the original bill, but the court found that the complainant had prepared and would have made this amendment without such answer, and that the answer was therefore not necessary; that there was no contest between the complainant and the defendants as to the shares to which they were entitled, and upon this showing an allowance for attorney's fees was made. In Bliss v. Seeley, 191 Ill. 461, the defense was held to be good in the court below but bad in the Supreme Court; however, not formal, frivolous or vexatious, but a defense of a substantial character.

The law in this state, then, with reference to making allowance for solicitors' fees in a partition proceeding, is that the substantial defense required to prevent the apportionment of costs, including attorneys' fees, (1) must be made in good faith, though not necessarily successful; (2) must be substantial; (3) must not be made where it is unnecessary for defendants or any of them to employ counsel to protect their interests in the land sought to be partitioned.

In the case at bar, the complainant properly set forth in her bill the rights and interests of all the parties interested in the property sought to be partitioned. There were four defendant owners and fourteen tenants defendant. Against the tenants, orders of default were entered; the defendant owners, by counsel, filed their joint answer admitting that the rights and interests of all parties interested in the property were properly set forth in the bill; and that they and the complainant derived their title from a common source, as properly set forth in the bill; but denying that it was necessary for complainant to give history of title in her bill

and further denying that complainant was entitled to the relief, or any part thereof, in said bill demanded. Issues were joined, the case referred to the master. Little or no evidence was there heard, but upon statements of counsel and the pleadings, the master reported that the rights and interests of the complainant and defendants in the property were as set forth in complainant's bill and as admitted by defendants' answer. The court approved said report.

The question is, was this answer, as tested by the requirements of the statute and the decisions of this state above referred to, necessary to protect their interests in the land, or was it filed in good faith and is it of a substantial character. It is suggested by counsel for appellant that upon an examination of the bill by defendants it became apparent therefrom that, while counsel for appellee had properly set forth the rights and interests of all parties, still that several irrelevant allegations were found therein with respect to the history of the title, the proof of which would entail an unnecessary expense upon the parties to the suit, and that therefore defendants were justified in employing, and did in good faith employ, counsel for defense. A further reason for employing counsel is stated to be that the names and places of residence of the heirs of Thomasine Thomas, who have no interest in the proceedings, are particularly specified, and that proper steps were not taken to make them parties.

From an inspection of the bill, we find that the rights and interests of all parties were properly set forth and we do not believe that the slightest apprehension reasonably could have been entertained, that the rights and interests of the defendants were not fully, fairly and properly therein set forth and protected. It is true the bill contains some unnecessary allegations, but they in no degree called in question the rights of the defendants, and if proof thereunder were introduced, could have at most but slightly increased the costs upon reference. Defendants' counsel claim that they represented defendants in negotiating with the parties and with the commissioners appointed by court

to partition the property. These services, if rendered by defendants or their counsel, were voluntary. There is no reason to believe that the commissioners sworn to do their duty would not have properly partitioned the property among the several owners, even if there had been no interference with them on the part of the defendants or their counsel. In fact the partition of the premises in question was highly satisfactory to all parties interested. Even if counsel for appellant did succeed in reducing the expenses in taking the evidence by an amount which would have been incurred before the master in showing deraignment of title, this is not a reason why no allowance should be made for a solicitor's fee in this case, but might properly be taken into consideration by the chancellor in fixing the amount of such fee. It appears from the evidence that the amount, if anything, thus saved by solicitor for appellant would be a comparatively small sum, perhaps not to exceed $5 in favor of each owner.

It is next claimed that the amount of fees allowed was excessive. The commission appraised the property to be partitioned at the sum of $72,500. The property consisted of two pieces of land, one fifty acres, and the other a piece of improved city real estate. The proceedings were not complicated, continued only through a few months, and involved service of summons upon some non-resident owners, but there was no contest in the proceedings, except as to allowance of a solicitor's fee. The court costs, including the master's fee, are almost nominal. The court decreed an allowance, as the reasonable, usual and customary complainant's solicitor's fee, of $1,999.98. Several lawyers were called as witnesses on behalf of complainant and defendants. Their testimony was very conflicting and evidenced an extraordinary difference in their opinions as to the reasonable, usual and customary fees earned by complainant's solicitor, ranging from $250 to $5,000.

The court of his own motion called three distinguished members of the Chicago bar and submitted the case as hereinafter stated to them as to what was a reasonable, usual

and customary fee for complainant's solicitor, under the circumstances of the case. A statement of the case was made to these three lawyers by the court and supplementary statements by counsel for defendants, and these gentlemen after consideration of the case reported to the court that in their opinion $2,000 would be reasonable as a fee charged by reputable attorneys to do this class of work at this bar. The court committed no error in calling these men and taking their opinions as to what was a reasonable, usual and customary charge for the services of complainant's solicitor rendered in this case.

In determining the amount of solicitor's fees the court should take into consideration the personal skill and standing of the lawyer, his experience, the nature of the controversy, both in regard to the amount involved and the character and nature of the questions raised in the case, as well as the result. In view of the large amount of property involved in this proceeding, the responsibility of an attorney in conducting the same, the labor necessary to learn the conditions of the titles to the various pieces of property before filing the bill, the names and residences of the parties interested, the necessity of knowing the limits and the physical situation of the various pieces of property, the care requisite to exclude every blemish from the record of proceedings affecting the title to real estate, and in view of the amount of work testified to, as done by complainant's solicitor, we are of the opinion that the amount fixed by the chancellor is fairly based upon the evidence, excluding the report of Messrs. Shope, Moran and Hardy. However, we consider that the objection by counsel for defendants, after hearing such report, came too late, because defendants' counsel took part in making a statement and especially in presenting defendants' side of the case to the said three lawyers, and then, after concluding his statement and hearing the court request the said gentlemen to confer over the statement, he remained quiet and speculated upon the report that those gentlemen might make, and not until he had heard their report did he make the slightest objection to

the competency of their report. However, the record does not show whether the court was influenced to any extent whatever by, or even took into consideration, the said report.

In the case for partition of Dunn v. Berkshire, *supra*, it is said, "It is unnecessary to discuss the question of the competency of this evidence; the cause was heard before the chancellor and it is presumed that he considered only competent evidence in rendering the decree." The record shows there was sufficient competent evidence upon which to base that portion of the decree in this case fixing the amount of the complainant's solicitor's fee.

Appellant offered to prove by the witness Kenny, certain negotiations prior to the filing of the bill, but the bill was subsequently filed and a satisfactory partition made. Complainant had good right to invoke the aid of the court for partition, if she so elected, and any negotiations not resulting satisfactorily were no bar to the beginning of the suit in partition, and proof thereof, under the circumstances of this case, would have been entirely immaterial.

It is further insisted that it was error to enter a decree for solicitor's fees in favor of the solicitor, he not being a party to the suit. We think the order was entirely regular and proper. The decree orders that amount be apportioned as follows:

"Complainant to pay Frank P. Reynolds, complainant's solicitor, $333.32 thereof; that the defendant, Mary A. McMullen, pay to said Frank P. Reynolds, solicitor as aforesaid, one-sixth part of said nineteenth part of said $1,999.98, namely, $333.33; and the said last mentioned amount so ordered to be paid is hereby made a lien upon the interests of said Mary McMullen in the premises so set apart for her; that payment be made within ten days from and after the date of entering this decree, and that in default of payment as aforesaid, execution issue in favor of said Reynolds and against said Mary A. McMullen for said last mentioned sum of money."

The decree made a like provision for lien and payment of the same amount by each one of the defendants. In Habberton v. Habberton, *supra*, a similar decree was

approved by the Supreme Court. It was there directed that the parties to that suit, complainant and defendants, pay the solicitor's fee "in accordance with their respective interests in the premises, as found by the decree of this court * * * but said sum to be a lien upon the lands in this decree." In that case, it was held that no one owner could be required to pay more than an equal proportion of the amount in view of the land he had, and when he had paid that amount, his part of the land was held to be free from the lien. The decree entered in the case at bar assesses his fee as costs in favor of complainant's solicitor. The statute provides "that the court shall apportion the costs, including the reasonable solicitor's fee, so that each party shall pay his equitable portion thereof." The term "each party" as used in the statute applies to the complainant as much as to the defendants. It would be absurd to order the complainant to pay himself his portion of the solicitor's fee. The provision in the statute is made for the benefit and should be in favor of the solicitor. Counsel have referred to a line of cases involving the construction of the statute in relation to solicitor's fees in divorce proceedings, but the statutes and the principles controlling the allowance of solicitors' fees in the two proceedings for partition of real estate and for divorce are entirely different. In divorce proceedings, the husband is required to pay his wife her reasonable solicitor's fees, in order that she may thereafter be entirely independent and free to decide whether she will use the amount of money thus awarded her as her reasonable solicitor's fees with which to defend herself, or will make default therein; but the theory of the statute providing that the court shall apportion a reasonable solicitor's fee is not that the fee is to be paid to the complainant for his exclusive benefit, but for the exclusive benefit of the solicitor, who renders valuable service to all parties in the proceeding. In this case, no direction that a master in chancery execute the decree or collect the costs, including the solicitor's fee payable to complainant's solicitor, Frank P. Reynolds, is made, but

paragraph fifty-seven of the chancery act provides that in such case, the decree may be carried into effect by execution, which, when issued, shall have the same operation and force as similar writs issued upon a judgment at law. In Lilly v. Shaw, 59 Ill. 72, the court found that in a contested case a solicitor's fee had been improperly allowed, and further remarked that the form of the order did not follow statute. But in preparing the order in this case, the statute, as above shown, was strictly followed. We are therefore of the opinion that the form of the decree whereby the court apportioned the costs, including the reasonable solicitor's fee, among the parties in interest in the suit so that each party should pay his or her equitable portion thereof, complied in every respect with the requirements of the statute.

The decree of the Circuit Court is affirmed.

---

105 394
a204s 38
204s 41
105 394
113 622

Samuel P. Parmly v. J. Hamilton Farrar.

1. PRACTICE—*Where Juries Have Found Three Times the Same Way.*—Where the facts have been determined the same way three times, the verdict should be deemed conclusive unless material errors of law have intervened, or it is made to appear that passion, partiality or prejudice have guided the verdict.

Assumpsit.—Appeal from the Superior Court of Cook County; the Hon. AXEL CHYTRAUS, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Opinion filed January 16, 1903. Remittitur filed and cause affirmed January 22, 1903.

HECKMAN, ELSDON & SHAW, attorneys for appellant.

ARTHUR B. WELLS and JOHN M. BLAKELEY, attorneys for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

This is an appeal from a judgment for $5,000 entered pursuant to the verdict of a jury assessing appellee's damages at that sum.

The suit is brought in assumpsit under the common counts, upon an alleged verbal contract. Appellee states that he was by a written document given the exclusive agency, for thirty days, to effect a sale of Boone Block, Chicago, for $250,000; that upon appellee's refusal of the contract on those terms and its return to appellant, the latter abandoned the limitation as to time, saying to appellee, "never mind the thirty days; go ahead and sell it;" that subsequently there was a further modification by which appellant authorized appellee to effect a sale to the final purchaser, Wirt D. Walker, who owned the corner adjoining said Boone Block, the consideration to be certain properties belonging to the latter, to be taken in exchange as equivalent to the price originally named. Appellee claims to have fully performed the contract, to have induced Walker to make the exchange, and brought the parties together so that the transaction was finally consummated. It is claimed that there was an understanding between the parties to the suit that appellee should receive $5,000 as a commission for effecting the sale. This, however, does not seem to have been included in the actual terms of the contract as it is stated by appellee. What was said about that seems to have been prior to the time when, by the written instrument, a contract was first given to appellee as he states, and so far as appears from his statement of the contents of that paper, it contained no reference to any specific sum to be paid him as commissions, and this appears to have been omitted also from the alleged verbal contract and its modifications as testified to by appellee. The contract, according to the abstract of appellee's testimony before us, was an authorization or employment to effect a sale or exchange of Boone Block for $250,000, or for certain specified property then belonging to Wirt D. Walker, the compensation for so doing to be *quantum meruit.*

The cause has been tried now four times before as many different juries, each trial resulting in a verdict in favor of appellee. The first verdict awarded him $3,000. This was set aside. Upon the second trial there was a verdict

for $2,500. This also was set aside. Upon the third trial appellee recovered a verdict and judgment for $5,000. This was affirmed by the Appellate Court (Parmly v. Farrar, 67 Ill. App. 624), but reversed by the Supreme Court for error in the refusal of an instruction. (Parmly v. Farrar, 169 Ill. 606.) There is now a fourth verdict in favor of appellee upon which a judgment has been entered, which we are asked to reverse.

When the cause was in the Appellate Court upon the former appeal from a judgment for the same amount as in the present instance, it was said: "We will not examine the facts in the face of three verdicts against the appellant upon the same issue * * * further than to ascertain if there was evidence that fairly tended to support the verdict." The cause is now here with a fourth verdict in favor of appellee upon the same pleadings, and so far as we are advised, substantially the same evidence. In the present instance, as heretofore, it is clear that there is "enough evidence upon which a jury might do as was done," although it is still true in our opinion, as heretofore, that the preponderance is with the appellant. In the opinion of the Appellate Court above referred to, Mr. Justice Shepard reviews the effects of repeated verdicts, and concludes that unless material errors of law have intervened or it is made to appear that passion, partiality or prejudice have guided the verdict, the facts three times determined the same way should be deemed conclusive. This does not in the case at bar apply to the amount of the verdict, for that has varied as before stated. But that appellee is entitled to recover some amount, we are compelled to conclude as finally settled. It is not to be presumed that passion, partiality or prejudice have influenced four different juries in as many trials.

It is urged, however, that the judgment must be reversed for errors of law. What we have above said, sufficiently disposes of the first objection, that the preponderance of the evidence is with appellant. Even if it is true, and as we have said, we incline to that opinion, the repeated verdicts preclude further review.

It is urged that there is no evidence to support the verdict, first, because the contract testified to by appellee contemplated payment of a commission only in case there was a sale for $250,000; and that as there was no sale, but merely an exchange of properties, the contract was not performed; and second, because there is no evidence that the real estate received by appellant in exchange was worth $250,000. However that may be, there is evidence from which the jury could find that the contract was fully performed by appellee, if, as they seem to have done, they considered that appellee did in fact bring about the sale or exchange by the efforts to which he testifies. The mere fact that appellant may have finally consented in concluding the sale to a reduction in the consideration, or to receiving payment in other property instead of cash, would not deprive appellee of any right he might have to a commission already earned. See Parmly v. Farrar (*supra*), 67 Ill. App. 624–628. There is testimony tending to show that appellant authorized appellee to make the trade as it was finally concluded, which, if true, was a modification in that respect of the original terms of the alleged contract.

It is urged that the court erred in excluding from the jury certain evidence concerning the negotiations which it is said resulted in the exchange between appellant and Walker, to whom Boone Block was conveyed. By this refused evidence, it was sought to show the physical condition of Boone Block at the time the negotiation between appellant and the purchaser, Walker, was entered into; that Walker, acting under a party wall agreement with appellant, had removed the wall of Boone Block for the erection of a new party wall between the properties; that appellant's tenants had been interfered with, and water pipes frozen in consequence of the removal; that Walker had become liable to appellant for damages, and that it was these conditions and this liability which led to the negotiations and induced Walker to make the exchange by which he acquired title to Boone Block, and avoided claims for damages and also the expense of the erection of a party wall

between the properties; conditions with which appellee had nothing whatever to do. It is urged, however, in behalf of appellee, that the evidence was properly excluded, because it related only to matters occurring after appellee had brought appellant and Walker together and earned his commission under the alleged contract, and that it was therefore immaterial. That, however, is the point in dispute—whether appellee did bring the parties together and earn his commissions, and some of the evidence to which objections were sustained, was, we think, competent as bearing upon that question. Appellee claimed that the exchange with Walker was consummated, as he says he told appellant, "on the identical figures I advised him to make, and you to make, and the identical figures that you asked me to submit to him." It was, we think, competent for appellant to show that other circumstances existed calculated to bring the parties together and to effect the sale or exchange, such evidence having a direct bearing upon the question whether appellee's efforts or other causes brought it about. It does appear, however, that by appellee's direct testimony the jury were advised of the existence of these conditions; and that appellant was claiming "that Walker was piling up a great lot of damages against himself," because of the party wall. The facts were therefore made known to the jury, notwithstanding the rejection of the evidence referred to. Appellant was not permitted to introduce a letter which he claims to have written to Walker, calling the latter's attention to damages likely to arise from the conditions created by tearing out the wall; and evidence of a third party, as to what he heard said by appellant and Walker, appellee not being present, in conversations relating to the exchange, was also ruled out. But Walker himself had been put on the stand, and had testified sweepingly that appellee was not instrumental in bringing about the sale. His testimony was the best evidence on the matters referred to, and the general rule that parties can not be permitted to introduce evidence for themselves made by writing letters or by making statements in conversations of which the party

affected thereby is not cognizant, is not to be lightly disregarded. On the whole we are of the opinion that appellant was not injured by the rejection of the testimony referred to, although, as we have said, some of it might, we think, with propriety have been admitted.

The suit was brought under the common counts, upon the theory that a special contract had been fully performed, leaving only a simple debt due appellee. This contract, as stated by him, was modified so as to authorize an exchange of the property without the limitation as to price, and without reference to the exact value of the property taken in exchange. We find, therefore, no error in the instruction complained of and no conflict with the fifth instruction given in behalf of appellant.

On the whole the case was, in our opinion, fairly submitted to the jury, notwithstanding the rejection of some evidence which might, as we have said, been properly admitted, and we should not hesitate to affirm the judgment, except for the preponderance of the evidence against appellee. The judgment is for $5,000. The express contract, as testified to by appellee himself, does not contain an agreement to pay any specific sum. It is stated by appellee that appellant told him before the latter gave him the agency, as he claims, to sell Boone Block, "You can make your $5,000 when you sell Boone Block." But the agency was not given at that time, and when it was given it was in writing, and according to appellee's testimony substantially as follows: "I hereby give you the exclusive agency for thirty days for sale of the Boone Block at $250,000. Samuel P. Parmly." This contains no reference to the amount of commissions to be paid appellee for the sale. Nor was the amount fixed by any of the alleged subsequent verbal modifications. Appellee was entitled, therefore, to recover under the common counts, if at all, upon a contract claimed to have been fully performed, such amount as his alleged services were reasonably worth. Different juries have disagreed upon the sum to be awarded. In view of this fact, and the further fact that both trial

and reviewing courts have expressed the opinion that the verdicts were against preponderating evidence, a view in which we are obliged to concur, but recognizing, nevertheless, that inasmuch as four juries have found appellees entitled to recover we are bound to respect such finding upon the questions of fact, we are of opinion that it is our duty to affirm the judgment, with such modification of the amount as will conform to that one of the finding of the juries who have heard the evidence in the case, which seems to us from the evidence most nearly in accordance with justice between the parties.

If, therefore, the appellee shall within ten days from the date of filing this opinion remit $2,500 from the judgment in his favor, the judgment so modified will be affirmed. Otherwise it will be reversed and the cause remanded.

---

105 400
r203s 192

Chicago & Eastern Illinois R. R. Co. et al. v. Jeremiah Donworth.

1. RAILROADS—*Owner of Franchise is Liable for Negligence of Those Whom It Allows to Use It.*—Where injury results from the negligent or unlawful operation of a railroad, whether by the corporation to whom the franchise is granted or by another corporation, or by individuals whom the owner authorizes or permits to use its tracks, the company owning the railroad and franchise is liable.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Opinion filed January 16, 1903. Remittitur filed and cause affirmed January 20, 1903.

W. H. LYFORD and K. M. LANDIS, attorneys for appellants; ALBERT M. CROSS, of counsel.

JOHN C. KING and W. J. KING, attorneys for appellee. ANDREW J. HIRSCHL, of counsel.

MR. JUSTICE FREEMAN delivered the opinion of the court.

This is an action on the case for personal injury, which

resulted in a judgment of $5,000 in appellee's favor against appellants, who prosecute the appeal.

The accident happened at a point where Twenty-sixth street in Chicago (running east and west) crosses eight railroad tracks, running north and south. The easterly four of these tracks are called in evidence the "Fort Wayne" tracks. The westerly four are called the "Western Indiana" tracks. It is undisputed that plaintiff was struck by a south-bound passenger train of the Chicago and Eastern Illinois Railroad Company, appellant, on the third track from the west of the Western Indiana tracks, as he was crossing the tracks on foot. The two sets of tracks were separated by a clear space of about fifteen feet; and in this space, north of the crossing, was the tower-house, occupied by the operator of the crossing gates, and in the same space was the flagman's shanty, south of the crossing. East and west of the entire system of tracks were crossing gates, operated by compressed air from the tower-house. The distance between these gates is variously estimated from ninety to one hundred and twenty feet.

Appellee's theory of the case is that he walked onto the crossing from the west, going east; that he looked and saw nothing till too late; that no bell or whistle sounded on the train, and that the speed of the train was about twenty-five miles per hour. On the other hand, the theory of appellants is, that appellee walked onto the tracks from the east going west; that he did not look, but recklessly stepped in front of this train, which he could not have failed to have seen (in broad day-light) had he looked; that both the engine bell and the tower-bell were ringing, and that the speed of the train was not to exceed twelve miles per hour.

It is first urged that the trial court erred in entering judgment against both defendants, when, as it is said, there is no evidence tending to show liability of more than one. Although it is conceded that the train by which appellee was injured belonged to the Chicago and Eastern Illinois Railroad Company and the tracks upon which it was run-

ning at the time belonged to the other defendant, it is said there is no evidence that the former company was using the track under agreement with or without the knowledge and consent of its owner. It is not claimed that, in fact, such use of the track was without express knowledge and consent of the owner, and there is, we think, evidence warranting the conclusion that express authority existed. It appears from the evidence to have been recognized as proper and not unusual by employes of the owner of the track, and it was certainly permitted, and without objection, so far as appears, in this instance. We are of opinion that in the absence of any evidence whatever tending to show that such use of the track was without consent of the owner, the fact that such use was permitted without objection, so far as appears, by one railroad company of another's tracks, is sufficient to charge the owner of the tracks with liability for negligent conduct of the user. It is not to be presumed that employes of one railroad company would permit the trains of another company to run on the former's tracks at random without authority. Such use would upset schedules, disarrange traffic, and interfere with the use of the tracks by the owner to such an extent as to interrupt and put a stop to its business. It would not be tolerated. "Where injury results from the negligent or unlawful operation of the railroad, whether by the corporation to which the franchise is granted or by another corporation, or by individuals whom the owner authorizes or permits to use its tracks, the company owning the railway and franchise will be liable." Penn. Co. et al. v. Ellett, 132 Ill. 654–659–660, and cases there cited; C. & E. R. R. Co. v. Meech, 163 Ill. 305–308.

It is urged that the verdict is against the weight of the evidence. There is a radical conflict in the testimony as to material facts. Appellants' witnesses state that the gates were lowered, that the engine bell was ringing and that appellee approached from the east going westward. The engineer of the train was on the right or west side of his engine. He states that he did not see appellee until just as he was struck, and if appellee was in fact approaching from

the east, as appellant contends, the failure of the engineer to see him would be explained, because the boiler and smoke-stack of the engine would shut off his view of objects near the track on the left or east side of the engine when close at hand. If appellee was crossing from the east and going westward he had a full and unobstructed view of the tracks to the north, and ought to have readily seen the train approaching from that direction, the whole time it took him to go from the crossing gates on the east across four tracks of the Fort Wayne road, over the fifteen intervening feet to be traversed to reach the first of the Western Indiana tracks, and then over that track before coming to the place on the second from the east of the Western Indiana tracks, where he was struck. It is said that he could scarcely claim to have been exercising ordinary care if he permitted himself, about eight o'clock in the morning, in broad daylight of a clear day, to step in front of a train, of the approach of which he had such ample opportunity to take notice. Two witnesses, one of them appellee's brother-in-law, testify, in support of his statement, that he was going toward the east, while he was contradicted in this respect by four witnesses for appellant. These are the engineer of the train, the flagman on duty at the crossing, the tower-man and the block-signal operator; and there is also evidence tending to show that the two witnesses for appellee referred to were not where they say they were at the time of the accident. The train which struck appellee was coming from the north. If, therefore, appellee was coming from the west and going eastward, it would appear that he should have been struck on his left side; whereas the testimony of his physician, who treated him for some months after the accident, shows that appellee's bruises were all located on his right side. This is not disputed and indicates that he must have been struck on that side, which, to say the least, would not be probable, if in fact he was going, as he says he was, in such a direction as to present his left side to the engine which hit him, and jumped, as he says he did, "right ahead to get away from it." He was struck with force sufficient, it is said, to throw him twenty-five or thirty feet, and a blow of

such force from an engine could not fail to so bruise him as to leave marks. These were all found upon his right side.

Appellee's statement is that he was walking eastward on the south side of the street which crosses the tracks at that point and was approaching the tracks from the west. He states that the crossing gates were not down; that while going eastward he looked north just before he reached the first rail; that there a building on the north side of the street obstructed his view of the tracks to the north; that he then crossed the first track and looked south, and when he reached the middle of the third track he looked north, "and when I looked north this train was hardly as far away from me as that table is now, which distance I think was six feet, but which you think ten or twelve; that was the first I knew of the train, and when I saw it I jumped right ahead to get away from it. I believe I was thrown backward but I can not remember any more; I don't know whether I was thrown forward or backward; the last I knew I jumped forward." He says "there was no bell on that train; I did not hear any; I noticed how fast the train was going by the way it came on me. I am told it must be going twenty-five or thirty miles an hour; that is all I know about it." It appears from this testimony, assuming that appellee was going eastward, as he says he was, that after leaving the gate he crossed two tracks and the intervening spaces between them and had reached a third track without looking north, most of this time having an unobstructed view of the approaching train, which he neither saw nor heard. There is testimony for appellant that appellee was looking down as he walked, and it is apparent that he must have been absorbed in what he was thinking of.

While we are not satisfied with the conclusion of the jury upon the evidence in this case, which it is not necessary to further review in detail, yet it is undeniable that there is evidence which may justify their finding on some of the questions of fact. The evidence to the contrary is not so decidedly preponderating as to make it necessary for us to set aside the judgment upon that ground.

It is urged that the damages are excessive. There is evidence tending to show that appellee was about fifty years of age when injured. He had been engaged in loading lumber from vessels, and had for a time been a teamster driving wagons with coal and iron. Since the accident he has been a private night watchman for about two and one-half years, employed to watch forty-two houses on Drexel Boulevard, involving much walking by night, and has no apparent difficulty in doing the work required. The permanent result of his injury seems to be that it has left the ligaments of the knee joint of his right leg weaker and the leg less steady than before. He was confined to his bed for about two months, and was not able to work for more than a year. He has occasionally a slight stricture of the urethra which first appeared a month or so after the injury, and has required opening up by the simple introduction of a sound two or three times a year. Appellee says he can not hear anything with his left ear, and one of his medical witnesses positively testified, over objection, that appellee had lost his hearing; but the same witness on cross-examination stated, "As to that all I know is what he told me." We think appellant's motion to strike out the direct testimony of the witness on that point was erroneously overruled. There is no evidence, so far as we are advised, that the alleged condition of his hearing is a result of the injury, though if in fact there is any such difficulty in his hearing on that side it might, perhaps, have been so caused. We are of opinion that the verdict is larger than is proper under the evidence as it now stands.

Complaint is made of error in refusing and modifying instructions. While we think it would have been proper to give some of the refused instructions requested by appellant, yet in view of the evidence we do not find that reversible error was committed in this respect. If, therefere, appellee shall within ten days from the filing of this opinion remit $2,000 from the judgment, it will be affirmed for the remainder. Otherwise the judgment will be reversed and the cause remanded.

The Town of Cicero v. The People of the State of Illinois ex rel.

1. JUDGMENTS—*Power of Court to Make Them Payable out of a Special Fund.*—Where a contract makes a claim payable out of a special fund, the court has jurisdiction and authority to render a judgment directing that the same be paid out of moneys belonging to that particular fund.

2. SAME—*Conclusiveness of.*—The judgment of a court of competent jurisdiction directly upon the point is, as a plea, a bar, or as evidence conclusive between the same parties upon the same matter directly in question in another court.

3. SAME—*Record Includes the Terms of a Written Obligation Set Forth upon the Docket.*—When a judgment is recovered according to the terms and conditions of a written obligation for the payment of money, and those terms are set forth upon the docket, it must be held to be a part of the record of the judgment.

4. MANDAMUS—*Writ Not Issued in a Doubtful Case.*—The writ for mandamus is a high prerogative writ, to be awarded in the discretion of the court, but not in a doubtful case.

Mandamus.—Appeal from the Circuit Court of Cook County; the Hon. MARCUS KAVANAGH, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Affirmed. Opinion filed January 16, 1903.

This is a writ for mandamus to compel the town of Cicero to pay a judgment of $3,410.95, with interest and costs thereon recovered against it by the relators, Sackley and Peterson, on the 27th day of April, A. D. 1896.

The petition alleges that relators made a written demand for the payment of said judgment; that appellant (the town) responded that there was no money in the fund to pay this judgment; that a new supplemental assessment had been spread to meet this demand; and that when said supplemental assessment was confirmed by the court and collected, the judgment and interest would be paid. Petition further alleges that said judgment is a general judgment against said town, and payable out of the general fund of said town; or by means of a general tax, to be levied by said town; that said town has refused to pay said

judgment or to make an appropriation therefor, and include the same in the tax levied by said town for the year A. D. 1901, as requested by petitioners, in January, 1901, although on said last named date said town had, and ever since that time has had, money on hand more than sufficient to pay said judgment, and legally applicable thereto.

Petitioners then pray for a writ of mandamus to compel said town to pay said judgment and costs of this proceeding, and if it shall appear that said town has not funds legally applicable to the payment of said judgment, then that said town shall levy a tax for the payment of said judgment, etc.

To this petition the town filed a plea, which plea denied that said judgment was a general judgment against it; but averred that said judgment was obtained upon a contract made and entered into on the 11th day of June, A. D. 1890, by and between the town and petitioners, whereby the petitioners covenanted to do certain work therein specified for the improvement of Washington Boulevard, and the parties thereto agreed that said improvement should be paid for from special assessment, and also from the general fund of said town, so far as the same has been or may be assessed for its equitable proportion of the estimated cost of said improvement, and the petitioners agree to make no claim against said town under said contract, unless the assessment shall be declared illegal or be unreasonably delayed.

The plea further avers that the equitable proportion of the cost of said improvement assessed against the town has been paid; that a special assessment was levied upon the property benefited, but was not sufficient to pay in full for said improvement; that the town has begun proceedings for the levying of a supplemental assessment.

To this plea petitioners filed a demurrer. Thereupon an order was entered sustaining the demurrer, and the said defendant electing to stand by his plea, the court found that said petition was true; that the said town then had in its treasury a cash surplus arising from the taxes for the fiscal year ending February 28, 1900, legally applicable to

the payment of said judgment, and it thereupon ordered that a peremptory writ of mandamus issue against the said town and certain of its officers, commanding them immediately to pay to the petitioners their said judgment, and interest thereon from the date of its rendition, and costs of court.

GEORGE W. WOODBURY, attorney for appellant.

JOHN LEWIS, attorney for appellees.

MR. JUSTICE BURKE delivered the opinion of the court.

Appellant claims that the judgment in favor of petitioners was recovered on a contract for a local improvement payable out of special assessments; that there is no money in the special fund and that therefore mandamus will not lie. The record in this case shows that the judgment in question is a general judgment and does not appear to be a judgment payable out of a special fund.

If appellant's claim is good, that the work done by petitioners should be paid out of a special fund, diligence on its part at the time final judgment was entered required that it should have moved the court to have incorporated in said order that said judgment be paid out of a special fund. If justice demanded, the court had power to have protected the interests of the town by the entry of a judgment, making the same payable out of a special fund. Where a contract makes a claim payable out of a special fund, the court has jurisdiction and authority to render a judgment directing that the same be paid out of moneys belonging to that particular fund. If the town had so elected and the facts justified, the court could have entered a judgment directing that the judgment of petitioners be paid out of the moneys collected from a special assessment. City of Peoria v. Fruin-Bambrick C. Co., 68 Ill. App. 277.

The following cases—Peake v. New Orleans, 139 U. S. 342, and Belford v. Woodward, 158 Ill. 122, hold that a judgment may specify the fund from which it is to be paid.

In the absence of such provision in the judgment order

it may be fairly assumed that an absolute and general judgment was satisfactory to defendant. It can not be said, from anything appearing in the record and evidence before the Appellate Court, that a general judgment was not entirely proper. We can not say that because the services recovered for, were for an improvement provided for by an ordinance of the town, that it may not have appeared perfectly proper to the court and satisfactory to the parties that a general judgment be entered, or it may have appeared to the court that the town preferred a general judgment to a special judgment, or it may have appeared to the court that the town through its negligence in collecting the moneys for said work had become liable therefor, or because of its willful or negligent action had prevented the possibility of the collection of the judgment from special assessment; and against some of these emergencies the contract protected petitioners. Maher v. Chicago, 38 Ill. 267.

But speculation can not be indulged in with respect to the reason or reasons moving the court to enter a general and absolute judgment instead of a judgment made payable out of a special fund. It is now too late in this form of action to inquire into the consideration and conditions that led up to the judgment.

In Allen v. Haley, 169 Ill. 532, it is said that "the judgment in the original case is conclusive. The rule stated by Chief Justice De Grey, as to conclusiveness of judgments, is, that the judgment of a court of competent jurisdiction directly upon the point is, as a plea, a bar, or as evidence conclusive between the same parties upon the same matter directly in question in another court." This language, from being constantly quoted with approbation, has acquired almost the force of a statute, not only in reference to matters actually litigated, but as to all other matters properly involved, and which parties might have raised and had determined in the same cause. The following authorities sustain the same doctrine: Litch v. Clinch, 136 Ill. 410; Bailey v. Bailey, 115 Ill. 551; Harmon v. Auditor, 123 Ill. 122.

In support of his contention that the judgment can not

in law be an absolute and general judgment because the services of petitioners were rendered under contract for a street improvement provided for by an ordinance, counsel for the town refers to the statute relating thereto, and also to certain decisions of the Supreme Court of this state.

If the action for recovery of judgment for such services were pending before us, the law and decisions referred to would be relevant; but no appeal or writ of error was prosecuted from that judgment and no collateral attack can be made upon it. In the case of People v. Village of Hyde Park, 117 Ill. 462, a petition for a writ of mandamus was filed, praying that the village be required, among other things, to levy a general tax to pay judgments recovered in condemnation proceedings.

In that case it appears that judgments had been obtained in condemnation proceedings, and subsequent thereto the proceedings had been abandoned by the village as to some of the property and a writ of mandamus prayed to enforce the collection of these judgments. The court refused on the grounds that these so-called judgments could only be paid out of a fund arising from special assessment. It will be observed that the judgment in condemnation proceedings is only a conditional judgment. The proceedings were simply for the purpose of ascertaining and fixing judicially an amount which the village should pay as just compensation in order to be entitled to take the property for public use as a street. The judgment in such case should simply be, and doubtless was, in substance, an adjudication that the amount was a just compensation to be paid by the city for the taking of the property sought to be condemned.

In City of Bloomington v. Miller, 84 Ill. 621, it is said:

"A judgment in condemnation proceedings that the owner of the property shall unconditionally recover any given amount of the city is wrong. The city has a right to abandon the improvement. This proceeding merely fixed the amount to be paid before the property can lawfully be taken."

Hyde Park v. Nathan Corwith, 122 Ill. 441, is in all essential features the same case as the one last noticed, and

the statement is made that the condemnation judgments can only be paid, if at all, by special assessment under the original ordinance, which is in force as to them. Such is the nature of the conditional order fixing compensation for taking property in condemnation proceedings, that the entire proceedings, including the ordinance, the source of power and authority for instituting the action, are a part of such order, and to these and all parts thereof must the property owners look for their compensation.

In the case of Hyde Park v. Thatcher, 13 Ill. App. 613, the court say that when it is sought to coerce a municipal corporation into the doing of an act, the party applying must show not only a clear legal right to have the thing done, but he must show affirmatively that the corporation has the power and that it is its duty to do the act in the same manner sought. Again it is to be stated that the court there refers to a conditional judgment in condemnation proceedings, and it was there sought to coerce the village into paying these conditional judgments out of funds other than those specified by the law. The law relating thereto is interwoven into, and a part of condemnation proceedings.

Dolese v. McDougall, 78 Ill. App. 629, simply holds that money due contractors for making improvements may be assigned, and that all persons making contracts with a city, and who agree to be paid from special assessments, have no claim or lien except upon the special assessment fund collected for the work, and that when an ordinance provides for the making of a local improvement it must prescribe whether the sum shall be made by a special assessment or otherwise.

Again we say that the judgment in the case at bar is an absolute, unconditional and general judgment.

Black on Judgments, section 119, says:

"When a judgment is recovered according to the terms and conditions of a written obligation for the payment of money and those terms are set forth upon the docket, it must be held to be a part of the record of the judgment."

The writ of mandamus is a high prerogative writ to be

awarded in the discretion of the court, but not in a doubtful case. People v. McConnell, 146 Ill. 532; Swift v. Klein, 163 Ill. 269.

Appellant insists that in making the improvement in question, the town complied with the law, and that it is unjust to require the town to pay the same out of a general fund. But even if we had the right to go behind the absolute judgment, we believe that the contention of appellant would be found to be inequitable. The judgment was rendered under a contract of June 11, 1890, and its payment has been persistently and vigorously resisted in the various courts of the state, and now the town insists that the judgment creditor should not be paid until money is realized therefor from a special assessment.

In answer to the petition filed in this case, appellant says that it is exercising all diligence to collect the money through a supplemental assessment, to pay the same. However, the Supreme Court has just declared in the matter of this very supplemental assessment (Town of Cicero v. Hill, 193 Ill. 226):

"In order to institute a supplemental proceeding (if one could be instituted) it is necessary to pass a new ordinance and to file a new petition, to appoint new commissioners, and to go through with all formalities of spreading the assessment, etc. To sustain this proceeding would, in our opinion," continues the court, "not only violate the statute, but would open the door to serious abuses. Had it appeared to be necessary to institute this supplemental proceeding, no reason is shown why it could not have been instituted before the annexation. There was ample time and full knowledge of all questions affecting the necessity for it."

In this decision may be found an equitable basis for the absolute judgment at law entered against the town.

The judgment of the Circuit Court for a writ of mandamus is affirmed.

James M. Stryker et al. v. John B. Pendergast.

1. PRACTICE—*Where Exceptions Are Not Preserved.*—Where no exceptions are preserved to evidence or rulings in the trial court they can not be considered in this court.

2. SAME—*Judgment Not Reversed for Technical Error.*—A judgment for damages in an action of debt will not be reversed merely for a technical error.

3. PROCESS—*Effect of Technical Defects After Party Has Submitted Himself to the Jurisdiction of the Court.*—Technical defects in the summons are of no consequence after a party has submitted himself to the jurisdiction of the court, since the only use of process is to bring parties into court.

Debt.—Appeal from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Affirmed. Opinion filed January 16, 1903.

HENRY W. MAGEE, attorney for appellants.

WILLIAM H. DICKSON, attorney for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

This suit is brought upon a bond, the condition of which required appellant Stryker to pay over to appellee all sums of money received by him for appellee, or for the insurance company of which both were agents. Appellee sued originally in covenant, but subsequently filed a declaration in debt, and afterward obtained leave of court to change the form of the action. An order was entered so amending all papers in the cause.

Appellants' demurrer to the first of the two counts in debt was sustained, and issue having been joined on the second count, the cause proceeded to trial and judgment. No exceptions appear to have been taken, certainly none are preserved of record. We are precluded, therefore, from considering the sufficiency of the evidence to support the judgment; nor can we consider the rulings on motions since no exceptions whatever appear to have been taken to any ruling of the court. Wehrheim v. The Thiel Detective Co., 87 Ill. App. 565.

Technical defects in the summons are of no consequence after a party has submitted himself to the jurisdiction of the court, since "the only use of process is to bring parties into court." Baldwin v. Murphy, 82 Ill. 485. The court had power to allow an amendment changing the form of the action. (Sec. 24, Practice Act, Chap. 110.) Any informality in the entry of the orders without objection must be deemed to have been waived.

It is said judgment was entered in assumpsit. The abstract does not show the form of the verdict nor that of the judgment. No exception having been taken to the form of entry of the verdict nor to the denial of the motion for a new trial and in arrest of judgment, the question was not raised in the trial court pursuant to section 57 of the practice act, and it can not be here. A judgment for damages in an action for debt will not be reversed for such technical error (Bowden v. Bowden, 75 Ill. 111), if indeed there was such error, which the abstract of record before us fails to show. The judgment of the Superior Court is affirmed.

Carrie S. Friedman et al. v. Lewis Verchofsky et al.

1. BANKRUPTCY—*Section 70 (e) of the National Bankruptcy Law.*—Section 70 (e) of the national bankruptcy law gives the trustee power to pursue and recover property conveyed by the bankrupt to one not a *bona fide* holder, although the fraudulent conveyance may have been made more than four months prior to the filing of the petition.

2. SAME—*Purpose of Section 57 (e) of the National Bankruptcy Law.*—The sole purpose of section 57 (e) is to render null and void all conveyances of property made within four months prior to the filing of the petition, except as to purchasers not only in good faith, but for a present fair consideration.

3. SAME—*Section 11 (b) and (c).*—Section 11 (b) and (c) simply provide for the taking care of suits already begun prior to the adjudication, and is not a limitation upon the right of a trustee to appear in any suit, but rather provides the manner of procedure with reference to suits already begun and which may affect the estate of the bankrupt.

4. WORDS AND PHRASES—*Bona Fide Purchaser.*—A *bona fide* purchaser is one who pays a valuable consideration and takes the con-

veyance without notice of any equitable claim against the property conveyed.

Creditor's Bill.—Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Affirmed. Opinion filed January 16, 1903.

Statement.—This is a suit on a creditor's bill filed on the 14th day of July, 1899, by appellee, Lewis Verchofsky, against appellant, Carrie S. Friedman, and against her two daughters, Amelia E. Roseman and Hattie Kalish, and their husbands, and Jacob Hirsch, a brother-in-law of Mrs. Friedman. Lewis Verchofsky is Mrs. Friedman's uncle.

The bill alleges the recovery of a judgment on the first day of April, 1899, by the complainant against Mrs. Friedman for the sum of $1,750, the issuance of an execution and the sheriff's return of "no property found;" that in 1887 and 1888, Mrs. Friedman became the owner of three contiguous lots described in the bill; that complainant loaned her money for completing the buildings erected thereon; that on the 28th day of June, 1894, by a quit-claim deed, fraudulently and without any consideration, she conveyed said lots to said Jacob Hirsch; and that February 19, 1896, by warranty deed, said Hirsch and his wife conveyed the said property to the said two daughters of Mrs. Friedman without consideration, and for the sole purpose of hindering and delaying complainant in the collection of his claim; that Mrs. Friedman continued to be the real owner and her two daughters held title to said property for her use and benefit.

July 19th, five days after the filing of said creditor's bill, Mrs. Friedman filed a voluntary petition in bankruptcy, naming among others the complainant in this bill, also Edward Butcher and Walter Schumaker & Company as her creditors, and July 26, 1899, she was adjudged a bankrupt. She scheduled no assets. The complainant, also Edward Butcher, Walter Schumaker & Company and one Miller, filed their claims, and at a creditor's meeting elected George S. Dixon trustee in bankruptcy. Said Dixon was, on motion of some of the creditors, directed by the referee in bankruptcy to intervene as trustee in these

proceedings and to employ counsel. Under the practice in the referee's office, the creditor firm of Walter Schumaker & Company caused Mrs. Friedman to appear and to submit to an examination under the provisions of the bankruptcy act and there objected to her discharge, alleging the same matters of fraud as are set up in the creditor's bill. Many witnesses were called and testified on behalf of Mrs. Friedman and the said creditors, and a transcript of their evidence taken before the referee is by consent of parties made a part of the record in this case. After hearing the evidence and after notice was given to all the creditors, said objections were overruled and the said Mrs. Friedman was granted her discharge. The firm of Walter Schumaker & Company filed their intervening petition in this suit setting up a judgment obtained against Mrs. Friedman on the 19th day of December, 1896, in the sum of $543, for lumber sold and delivered to her for the improvement of said premises in 1888, the issuance of an execution on the 8th day of January, 1897, and a return "*nulla bona*," and making substantially the same charges of fraud as made in the creditor's bill. Pursuant to the said order entered in the insolvency proceedings in the United States District Court, the said George S. Dixon, as trustee, also filed his intervening petition in this suit and made substantially the same allegations of fraud as are found in the creditor's bill and prays that said deeds may be set aside, the property sold, proceeds paid to him as trustee, and an order entered authorizing him to take immediate possession of the property and collect the rents thereof. Answers were filed to the bill and intervening petitions, alleging that the said conveyances were *bona fide*, and denying allegations of fraud. Mrs. Friedman filed her cross-bill in this proceeding alleging the said insolvency proceedings in her estate in the United States District Court and praying that said proceedings be declared a sufficient bar to any further proceedings in this court, and that the original bill and the several intervening petitions be forthwith dismissed. A demurrer was filed to said cross-bill and sustained. Upon hearing, the Circuit Court entered substantially the follow-

ing decree, finding that the equities were with the complainant and said intervening petitioners; that the facts were substantially as set up in said bill and said intervening petition; that Mrs. Friedman now is and has been since she first acquired title, the real equitable owner of the said real estate and has been collecting the rents thereof; and that her daughters and said Hirsch had but a naked legal and nominal title to said real estate; that a receiver should be appointed to collect the rents thereof for the benefit of said trustee in bankruptcy, George S. Dixon; and that Mrs. Friedman should in equity pay over to the said receiver the rents of the real estate collected by her since the 26th day of July, 1899, the date on which she was declared a bankrupt; and it was therefore ordered and decreed by the court that said quit-claim deed, from Mrs. Friedman to said Hirsch, and the said warranty deed, from said Hirsch to the said daughters of Mrs. Friedman, "be and the same are hereby declared fraudulent and void as to the rights of the said trustee in bankruptcy;" and it was further ordered that William Raymond be appointed receiver, to collect the rents hereof, and after paying the costs of said receivership and the costs of the complainant and of the said intervening petitioners, hold the balance as such receiver for the sole benefit of said George S. Dixon, trustee as aforesaid. It was further ordered that the cause be referred to a master in chancery to take an accounting of rents collected by Mrs. Friedman, or by any parties to the suit, since the 26th day of July, 1899. It was further ordered that all parties to the suit forthwith surrender possession of the said real estate except that Mrs. Friedman might continue to occupy the flat now used by her in one of the buildings on said real estate until her rights under the homestead laws should be determined.

J. G. GROSSBERG and SAMUEL J. HOWE, attorneys for appellants.

MCARDLE & MCARDLE and ATWOOD & PEASE, attorneys for appellees.

MR. JUSTICE BURKE delivered the opinion of the court.

It is contended that the decree in this case should be reversed, because, first, the chief issue under the creditor's bill and the intervening petitions relates to the charge of fraud. It is alleged that the quit-claim deed from Mrs. Friedman to Mr. Hirsch, and the warranty deed from Mr. Hirsch and wife to the daughters of Mrs. Friedman were fraudulent as to creditors.

The chancellor who tried this case, heard the witnesses in open court. The evidence taken is voluminous and is sharply conflicting. The court having seen and heard the witnesses, was in a better position than we to judge of the truth of their statements and the weight that should be given to their testimony, and we will not reverse in such case except where it clearly appears that the evidence does not preponderate in favor of a decree. Fabrice v. Von der Brelie, 190 Ill. 460; Van Vleet v. DeWitt, 200 Ill. 153.

This case partakes of the bitterness of a family controversy. Most of the many witnesses called are related by blood or marriage. The hostility injected into this trial is phrased by counsel's description of parties when he states that on the one side are "the unprogressive, unwashed and unscrubbed," and on the other "the progressive, proud and cold," unable to restrain a genuine distaste for the former branch of the family. So intense became matters during the hearing that it is charged that witnesses in behalf of appellee, Verchofski, were told by the other side to leave the court and were given diamond rings to enforce the command; but the vigilance of complainant overcame the attempt to deprive him of witnesses and on the next day the tempted witnesses were in their places in court. The very aged, protesting a forgetfulness, and the young were called to the witness stand. The court appears to have taken an abundance of time to observe and study this family reunion or assemblage of parties and witnesses and their sharply conflicting testimony. With great care we have examined the record in this case and shall not extend this opinion with a detailed review of the evidence. Although appreci-

ating, in a case like this, the unsatisfactory result of making reference only to certain circumstances of the evidence, we nevertheless, to make it apparent that there was a sharp conflict, will notice briefly some controlling features in the evidence.

Whatever may have been the reason, Mrs. Friedman appears not to have been prompt in paying her debts. She incurred the indebtedness to several of her creditors when she improved her property on or before the year 1890. Her property was worth, perhaps, not less than $15,000 and was incumbered for $7,500. In June, 1894, she quit-claimed this property to Jacob Hirsch, her sister's husband, of Milwaukee, Wisconsin, for the consideration, as she alleges, of a cancellation of $5,000 of indebtedness held by Hirsch against her and the further consideration of $1,500 or $1,600 in cash. Her husband was engaged in buying and shipping horses and just prior to the Columbian Exposition of 1893 was in the saloon business in Richland, Wisconsin. Mrs. Friedman says that her husband was unfortunate and she was compelled to assist him and thereby forced to borrow money. However, as opposed to this statement Verchofski states that the business of Mrs. Friedman's husband was prosperous and that he sent her money. Mr. Hirsch is represented as being in the years 1894, 1895 and 1896 a man of large affairs and of wealth. To determine whether the conveyance from Mrs. Friedman to her brother-in-law was made in good faith, it is to be considered that he, the wealthy and obliging brother-in-law, should insist that his wife's sister convey this property for which she had labored so long and for the improvements of which she had not fully paid, and as one of Mrs. Friedman's witnesses testified, she went to Mrs. Friedman's house and found Hirsch there, "hollering for his money and she was crying and begging where she could get money." In this connection it is to be remembered that Hirsch had such confidence in Mrs. Friedman that he left her in apparent possession of the property with full authority to manage the same and to collect rents therefrom. When he took title thereto he did not procure

nor cause to be examined an abstract of title. He did not even insist upon or procure a deed from the husband of Mrs. Friedman. There is much in the record to which we will not refer, calling for a very careful weighing of the evidence to determine whether Mr. Hirsch was a *bona fide* purchaser of the property in question or whether he accepted title merely to accommodate his sister-in-law and to save her property from an attack of creditors. If the conclusion is reached that Mr. Hirsch was not a *bona fide* purchaser there was an abundance of evidence to justify the conclusion that the daughters of Mrs. Friedman were not *bona fide* purchasers and that they held the title for their mother. It is stated that the tenants of the property were so irresponsible and made such frequent removals that they were not required to sign a lease, yet one of the alleged owners moved away from the property and elsewhere rented premises, certainly not more desirable, and paid rent therefor.

There was a sharp conflict in the evidence as to whether Mrs. Friedman's daughters or their husbands had the amount of $6,000 said to have been paid by them for the premises. One of the daughters, Mrs. Kalish, testified: "I don't know whether my husband had other means outside of his salary. He didn't at the time I married him." Again the daughters received a warranty deed of the property from their wealthy relative, Mr. Hirsch. Soon after accepting such deed it was found that there were claims aggregating several hundreds of dollars which the mortgagee of the property insisted should be paid. These claims were paid by the daughters and they testified that they have never requested Mr. Hirsch under the covenants of his warranty deed to repay them said amounts. The daughters and their husbands testified that the alleged purchase price for the property of $6,000 was arrived at after a somewhat prolonged negotiation. It is a matter of comment that where the extreme amount was paid for the property that the purchasers would accept title without employing counsel to examine abstract of the same and

then fail to require Mr. Hirsch to pay any claims existing against the property, so abundantly able as he was to respond. An attempt was made to impeach one of the principal witnesses for appellee, but witnesses were called to sustain his general reputation for truth and veracity.

The record is replete with testimony and circumstances sharply in conflict. No good purpose can be served in further attempt to recall the evidence. Two distinct lines of irreconcilable testimony run through the entire record, and therefore we do not feel that we are called upon to pronounce one false and the other truthful, and in the premises we are not justified in disturbing the findings and the decree of the court.

Second. Counsel for appellants further claim that if the deeds were fraudulent as to creditors, still complainant and intervening petitioners are conclusively estopped from setting up such fraud in this proceeding upon the principle of *res adjudicata.*

Mrs. Friedman filed her petition in bankruptcy July 19, 1900, and specifications of objections were filed by one of her creditors, Shoemaker & Company, specifying substantially the same fraud as alleged in its intervening petition.

Mrs. Friedman was discharged upon a hearing of these objections, but long prior to her discharge the United States Court, when the proceedings in bankruptcy were pending, ordered the trustee, George S. Dixon, to appear, employ counsel and intervene as trustee in said creditors' bill proceedings, and pursuant to such order he filed his intervening petition therein and obtained a decree in his favor as aforesaid. The product of this litigation results to the benefit of the creditors of the estate which he represents, and unless there be good reason why the results of such litigation should not be retained for the benefit of the creditors, the court should not surrender it to parties who, through fraud, have become possessed of it.

It is true that Mrs. Friedman could not recover the property thus fraudulently conveyed by her, but it does not follow and is not the law, that the property may not

be recovered for the benefit of her creditors. The United States District Court ordered the receiver of her estate to intervene in these proceedings in the state court, not to recover property for her which should be retained from her estate, but solely to recover any and all property in which the creditors of her estate might or could have an interest. If the trustee has exceeded the powers conferred upon him by the United States District Court, or by its order discharging Mrs. Friedman, the United States Court has withdrawn power from the trustee to reap the fruits of the present litigation for the benefit of the creditors of her estate, she or her attorneys, if they desire to take these fruits away from her creditors, can appear in the United States Court and there represent that the trustee has exceeded his authority or has acted entirely without authority and ask the court to deal with him pursuant to the law.

We think that counsel misapprehend the scope of the trustee's power in this matter. The bankruptcy statute provides that the trustee shall be vested by operation of law with the title of the bankrupt to all property transferred by him in fraud of his creditors. It is abhorrent to reason to say that the trustee would have no more power and right in court than the bankrupt, to recover property fraudulently conveyed.

Counsel for appellants say that the bankruptcy act does not prevent suits by the trustee, but they say he must occupy no position antagonistic to the bankrupt for whose estate he is trustee. But it is to be said that he is a trustee, not for the bankrupt, but for the estate of the bankrupt, and in that estate the creditors have an interest and the spirit and whole trend of the present bankrupt act, is that the trustee shall conserve the entire estate of the bankrupt. With this thought and intent should the act and every section thereof be read and interpreted.

Section seventy (a) of the National Bankruptcy Law of 1898, reads as follows:

"The trustee of the estate of a bankrupt upon his appointment and qualification shall be vested by operation of law,

with the title of the bankrupt as of the date he was adjudged a bankrupt (except in so far as it is to property which is exempt) to all (1) documents relating to his property; (2) interests in patents, patent-rights, and trademarks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) *property transferred by him in fraud of his creditors;* (5) property which, prior to filing of petition, he could by any means have transferred or which might have been levied upon or sold upon judicial process against him; * * * (6) rights of action arising upon contracts or from the unlawful taking or detention of or injury to his property."

By this section of the statute the trustee is declared to be vested by operation of law with title to property transferred by Mrs. Friedman in fraud of her creditors. Her trustee was directed by the United States Court to intervene in these proceedings where the title to property conveyed by her was being litigated. By operation of law he was vested with title to all property transferred by Mrs. Friedman in fraud of her creditors. And it was his legal duty as trustee thus vested to intervene and assert his rights.

In this connection should be considered section 70 (e), which is as follows:

"The trustee may avoid any transfer by the bankrupt of his property, which any creditor of such bankrupt might have avoided, and may recover the property or its value from the person to whom transferred unless he was a *bona fide* holder for value."

This clause does not read that the trustee may avoid any fraudulent transfer made by the bankrupt within four months of the time of filing the petition in bankruptcy, but we think, gives the trustee power to pursue and recover property conveyed by the bankrupt to one not a *bona fide* holder, although the fraudulent conveyance may have been made more than four months prior to the filing of the petition. The sole purpose of section 57 (e) is to render null and void all conveyances of property made within four months prior to the filing of the petition, except as to purchasers "not only in good faith, but for a present fair

consideration." A *bona fide* purchaser is one who pays a valuable consideration and takes the conveyance without notice of any equitable claim against the property conveyed. But under the bankruptcy act, property conveyed within four months prior to filing the petition can not be retained by the purchaser, unless he is a purchaser, not only in good faith but for a present fair consideration.

It can not be seriously contended, that because Mrs. Friedman, the grantor, could not have recovered this property, that therefore her trustee, though vested with its title, could not bring suit and recover it.

Section eleven (b) and (c) of the bankruptcy act does provide that the trustee may prosecute or defend any suit begun by or against the bankrupt prior to adjudication, but that section simply provides for the taking care of suits already begun prior to the adjudication and is not a limitation, as contended by appellants' counsel, upon the right of a trustee to appear in any suit, but rather provides the manner of procedure with reference to suits already begun, and which may affect the estate of the bankrupt. We do not regard the section as an attempt to enumerate or specify the powers of the trustee with respect to his appearance in litigation. Any other construction would result, as counsel insist it should result, in preventing the trustee from doing anything which the law would prevent a fraudulent grantor from doing. Such a contention is not in harmony with the spirit or the letter of the bankruptcy act.

But it is further insisted that even though the trustee may follow and recover the property of the bankrupt fraudulently conveyed, yet if some creditor has filed specifications of objections to the discharge of the bankrupt and those objections have been overruled and the bankrupt discharged, that by operation of law he is then divested of his title.

Without doubt the discharge of Mrs. Friedman prevented a recovery thereafter against her personally and she is in no way interested in being heard nor can she object to any proceedings that may be taken subsequently to her

discharge affecting the property of her estate. The record of this case simply shows that the objections, filed by one of the receivers to her discharge, were overruled. Upon what specific grounds we do not know, for the report of the referee is not preserved in this record. It must have appeared to the referee, either that the objections were not sustained by proof or that the charges therein were not of such a nature or did not relate to such transactions as would prevent her individual discharge, and it may further have appeared to the referee that her discharge would not release the property in question, the title to which was before her discharge vested in the trustee of the estate. One proposition, however, is beyond dispute, and requires the citation of no authorities to sustain it—that the adjudication of her discharge can not be pleaded by her two daughters as an estoppel in the proceedings at bar. They were not parties in that proceeding and there was no specific adjudication that the conveyance by the bankrupt to Mr. Hirsch or by Mr. Hirsch to the two daughters was good. It was simply an adjudication that no matters were proved before the referee, sufficient to prevent the bankrupt's discharge. We do not take the view that Mrs. Friedman's daughters may plead the discharge of their mother as a conclusive defense for them in this action. If the United States Court had specifically held that either of said deeds was fraudulent, such holding could not be pleaded against them. Every one is entitled to his day in court. If this position were not tenable, the title of a present holder of real estate could be taken away from him by attacking the former title of one of the grantors whose name appeared in the chain of his title. The Supreme Court of this state has said in Phelps v. Curts, 80 Ill. 109, that where a debtor after a creditor's bill is filed against him is declared a bankrupt and as such sets up his discharge in that suit, the effect is to preclude the court from rendering a personal decree against him, but it can not preclude the court from dealing with the property alleged in the creditor's bill to have been fraudulently conveyed.

In view of the order of the United States Court directing the trustee to intervene, and in view of the precise issue before the court in the matter of Mrs. Friedman's discharge, *i. e.*, was fraud of such character proved as to prevent her discharge, and in view of the considerations urged in this opinion, we hold that the order discharging the bankrupt will not bar proceedings under this creditor's bill. From what has been said it follows that the receiver had right to intervene in the case at bar even though it be held that so far as he is concerned it was an original proceeding. The question is not before us as to whether the bankrupt should personally be made a party to his proceeding, for the decree does not affect her as to any matters or things occurring at or prior to the time of her being adjudicated a bankrupt. The decree simply directs that she be allowed temporarily to remain in the property and that she turn over to the receiver appointed in the state court any rents that may be shown to have been collected by her subsequent to the adjudication of her bankruptcy. Considering the nature and scope of the allegations of the intervening petition of the trustee, and especially the fact of the investiture of the trustee with the title, we are of the opinion that the prayers are broad enough to warrant a decree for accounting of the rents as therein provided.

Aided by the industry of appellants' counsel we have considered all assignments of error and after a thorough inspection of the entire record we find no reversible error.

The decree of the Circuit Court is affirmed.

George Barrie et al. v. Rockwell King, Adm'r.

1. CONTRACTS—*Mutually Executory Contracts May be Abrogated by Agreement Without Consideration.*—A mutually executory contract may be abrogated by agreement, and set aside at any time, without there being any consideration for such abrogation other than the release of the respective parties from their respective obligations.

2. SAME—*Tender of Books Under.*—No effectual tender of books, or any portion of them, can be made under a contract, unless the books so tendered comply in all material things with the contract, both as to the books themselves and also as to the time at which such tender was made.

Assumpsit.—Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Affirmed. Opinion filed January 16, 1903.

This was an action to recover damages for an alleged breach of the following contract by Mrs. McGregor Adams, now deceased, by reason of her having refused to take and pay for certain books in accordance with a written contract obtained from her by appellant's agent, here set forth:

"MESSRS. GEORGE BARRIE & SON, PHILADELPHIA.

I hereby subscribe for a complete copy in twenty volumes, Japan vellum edition, of Historical Romances of William Harrison Ainsworth, to be delivered at the rate of one volume per month, as issued; for which I agree to pay on delivery $17.50 per volume. Publishers guarantee that there will be only one thousand copies of this edition printed on Japan vellum paper, and that the work as delivered will be equal in all respects to the sample shown by solicitor. MRS. MCGREGOR ADAMS.

March 5, 1898.

Issue to begin in January, 1888."

On the left-hand side are the words, "Bound in full Morocco at $17.50 Vol. J. McG. A." Also the words, "Color, red." At the top are the words, "With Historic Memoirs." At the right hand side are the words, "With Historical Memoirs." On the back are the words, "Coat of Arms and Fleur de Lis."

The books subscribed for were first tendered in May, 1899. When tendered, they had thereon the monogram of Mrs. McGregor Adams. Prior to the tender, Mr. William Burry, a lawyer, and the son-in-law of Mrs. Adams, had been authorized to represent and was representing Mrs. Adams in the matters arising out of her signing such contract. The tender of the books was made, under such arrangement, to Mr. Burry. His firm was that of Runnells

& Burry, and to such firm, November 7, 1898, appellants wrote a letter containing the following:

"We do not understand in what you think we acquiesced. On October 16th Mr. Salzer wrote to us that he had seen you and that the subscriptions were valid. In accordance with this we shipped the volume ready. We have written Mrs. Salzer to request her husband to call upon you and then send us a written memorandum of what you and he have agreed upon."

Upon the trial Mr. Burry testified that his attention was called to this letter and then testified as follows:

"After that Mr. Salzer called upon me and saw me, and asked what objections there were to the contract. I told them that Mrs. Adams was a very old lady, about seventy-eight years old, whose memory had almost failed entirely, and who was in feeble health, and that she was in poor condition when Mrs. Salzer called and the contract was made, because she was not able at that time to make a contract, and that he ought to rescind the contract; he asked how old she was, and what her state of health was, and I told him, as I stated here in the conversation, of which I will give the substance, and which lasted over half an hour, and he said he was satisfied and that he was very sorry. He said he was satisfied with my explanation, that he was very sorry that the contract had been taken and that he would hear no more of it. A month or two afterward he called and told me that he understood the defendant had settled some other contracts; that he understood that two other contracts taken by Mrs. Salzer to Mrs. Adams at the same time, amounting to $700, had been settled by his paying $200 to the book people, and he asked us what we were going to pay them for their contract. I said to him: 'I consider them canceled, and your demand a breach of our former agreement, and I will have nothing to do with you in any way,' and he left."

To all of the testimony given by Mr. Burry, the plaintiff objected. The jury returned a verdict for the defendant upon which there was judgment.

FOLLANSBEE & FOLLANSBEE, attorneys for appellants.

F. B. JOHNSTONE, attorney for appellee.

MR. PRESIDING JUSTICE WATERMAN delivered the opinion of the court.

The contract subscribed by Mrs. Adams provided that the twenty volumes were to be delivered at the rate of one volume per month as issued, and that issue was to begin in January, 1898. As this was but one of a large number of similar contracts for the same work, obtained from time to time by the appellants, it would seem that when the contract under consideration was made, March 5, 1898, that at least two volumes of the work should, at the date of the contract, have been ready for delivery, although there is no direct evidence that such was the case; but under the terms of the contract one volume per month was to be delivered upon each month succeeding March, 1898, whereas there was no tender of any of the volumes until May, 1899, some fourteen months after the making of the contract. According to the testimony of Mr. Alexander Barrie, a witness for the plaintiffs, Mrs. Adams refused to carry out her contract about the 16th day of January, 1899. If such be the case, appellants were excused from preparing or tendering any volumes subsequent to that date, but no sufficient excuse was shown for the failure to deliver any volumes during the months prior thereto.

When the books were tendered there was upon each of the volumes the monogram of Mrs. McGregor Adams.

Mr. Alexander Barrie, testifying for the plaintiff, said:

"I explain the depreciation in the value of the books this way: They were bound in a special color, and each book had stamped on it the monogram of Mrs. Adams. No other person would want a book with another person's monogram, and in uncompleted state. We have never yet, since we have been in business, found a purchaser for books already bound bearing a monogram."

The placing of a monogram upon each of the volumes was beyond and in violation of the contract. The contract no more provided for the placing of Mrs. Adams' monogram thereon than it did for the monogram of the king of England or any other royal personage.

Limited editions, such as this was, are sometimes pur-

chased with a view to profit that may be made by demand for, or by a rise in value of such edition after the limited number published, have been sold. It is manifest that if such edition contained the monogram of an individual, its value for the purpose of sale would be lessened, especially as, upon being offered for sale, such books would appear to be second-hand.

It may be argued that the monogram could not detract from the intrinsic value of the books, and was not a material departure from the contract.

Books printed upon Japanese vellum paper, an edition consisting of twenty volumes, sold at $17.50 per volume, are not purchased for the sole purpose of reading that contained therein, or having them on hand as works of reference. They are purchased largely because of the elegance of the material put into them, the artistic and handsome manner in which they are brought out, so that they are things of beauty. One keeps them as an adornment of his home, things to gratify his taste, and a delight to look upon. Purchasing such books at such a price, Mrs. Adams was entitled to have them entirely in accordance with her contract. If it were stipulated that the cover of the binding should be red, appellants were not at liberty to make it blue; nor to so change the color, although blue might be considered by artists in better taste and the volumes more salable. Mrs. Adams may have desired to present the books to some one or to sell them. Whatever may have been her motive for agreeing to purchase this work, it was the duty of appellants to comply with the contract, and not to depart therefrom in a matter as material as was the placing of her monogram upon each volume.

Appellants asked to have the following instruction given:

"You are instructed, as a matter of law, that in order to prevent one from completing a contract that he is at work upon for another, it is not necessary that there should be an active physical interference with the work that is being done by the one doing it. Any act upon the part of the party for whom the work is being done, clearly indicating that he will not accept the same if completed, is a preven-

tion of its completion, within the meaning of those words, as used in this connection. And in this case, if you believe from the evidence that the said plaintiff entered upon the contract referred to in the declaration filed in this cause, and after they partially completed the same or a part of the same, and some of them had been tendered, the said defendant, or her duly authorized agents or representatives, declined and refused to take said books, or any part thereof, then you are instructed, as a matter of law, that the said plaintiffs were thereby prevented from completing the same."

The second portion of this, beginning, "And in this case," the court refused to give.

No effectual tender of the books or any portion of the volumes could be made, unless the books so tendered complied in all material things with the contract, both as to the books themselves and also as to the time at which such tender was made. The instruction was properly refused.

Appellant also asked that the following instruction should be given:

"Even if you should believe from the evidence that Mr. Salzer, the husband of Mrs. Salzer, called upon Mr. Burry, the agent of the said original defendant to this suit, and acting for and on behalf of Barrie & Son, agreed that the alleged contract might be abrogated, yet, if you believe from the evidence that there is a want of any consideration for such a promise, you are instructed that such promise, if one was made, is not binding upon said plaintiffs."

A mutually executory contract may be abrogated by agreement, set aside at any time without there being any consideration for such abrogation other than the release of the respective parties from their respective obligations. The instruction was properly refused.

The following instructions were given at the instance of the appellee:

1. "The jury is instructed that if they find a tender of the books was made under the contract sued on in this case, such books must conform to the requirements and specifications of the contract, and if such books do not so conform to such requirements and specifications, Mrs. McGregor Adams and the defendant in this case were entitled to refuse the books so tendered."

2. "If the books tendered under the contract were marked with monograms, or in any other way than as provided in the contract, and such marking was in a material manner or part, and so as to materially affect their value or use, then the subscriber was not obliged to accept them."

Appellants urge that these instructions were improper, in that they did not contain the premise, "if the jury find from the evidence or believe from the evidence." Appellant was contending and still contends that the tender was by it made under the contract sued upon. We hardly see how, under such contention, they could have complained, if the court had instructed the jury that a tender of the books had been made under the contract.

There was no dispute that each volume of the books was marked with the monogram. Such marking was testified to by appellants' witness.

The second instruction, given at the instance of appellee, merely submitted to the jury the question of whether such marking was in a material manner or particular, and so as to materially affect their value or sale, telling the jury that if such were the case, the subscriber was not obliged to accept them.

Mr. Alexander Barrie testified:

"Each of the volumes had stamped upon it the monogram of Mrs. Adams. These books would have been absolutely worthless to any one else."

We fully appreciate the importance of the consideration submitted to us in appellants' brief, in which they call upon this court to right what they term the wrong done to appellants. Appellants have had accorded to them every right to which the law entitles them. They were upon the trial and are here represented by able counsel, so that upon an examination of the record and the briefs here submitted, we say their case could not in our opinion have been better handled. It is infrequently the case that both parties and counsel are not firmly convinced of the justice of the cause in which they are engaged and upon which courts are called to pass judgment. That they should be content with the

conclusions arrived at, is too much to expect from human nature.

We do not find any error in the record of this cause warranting a reversal of the judgment rendered. It is therefore affirmed.

James A. Edwards et al. v. Allan C. Story.

1. FRAUD—*Is Never Presumed.*—Fraud is never to be presumed, but must be affirmatively proved by the parties alleging the same. Such proof must be clear and satisfactory, and must be superior to that adduced to controvert it.

2. SAME—*What is Necessary to Impeach a Conveyance.*—To impeach a conveyance for fraud, both vendor and vendee must be shown to have intended to commit fraud.

Attachment and Garnishment.—Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Affirmed. Opinion filed January 16, 1903.

The facts of these two cases are presented in the following statement:

James A. Edwards instituted a garnishment proceeding in the Superior Court for the purpose of collecting an alleged judgment against George B. Johnson, a member of the board of trade, for the sum of $916.22 and costs. He summoned as garnishee, Albert B. Booth, a broker and member of the board of trade. The writ was served on Booth March 20, 1900. March 26, 1900, appellee, Allan C. Story, brought a suit in attachment in the Circuit Court against DuRuyter and summoned as garnishee said Booth. The writ in the attachment proceeding was served March 26, 1900. The funds sought to be reached by the attachment suit and the garnishment proceedings are the same, and consist of the proceeds arising from the sale of Johnson's membership in the board of trade to said DuRuyter. In November, 1900, Edwards was served with summons

issued in the attachment suit directed against himself and Johnson, impleaded with DuRuyter. On November 19, 1900, Edwards, in the attachment suit, filed an intervening petition setting up the recovery of the judgment against Johnson, the issuance and return of execution thereon, and the record of the garnishment proceedings, and asserting a prior lien and right to the money in controversy. To this petition Story filed a general traverse.

The two proceedings were heard and tried as one cause; a jury was waived and issues submitted to the court. A finding and judgment were entered in favor of Story, plaintiff in the attachment, and against the defendant DuRuyter, and garnishee, Booth, for $1,448, and against Edwards for costs, and an order entered dismissing the intervening petition, from which judgment appellants have prosecuted a separate appeal.

HENRY S. ROBBINS, E. R. BLISS and GEORGE GILLETTE, attorneys for appellants.

FRANCIS C. RUSSELL and FRED W. STORY, attorneys for appellee.

MR. JUSTICE BURKE delivered the opinion of the court.

It is contended in behalf of appellant Edwards, that the evidence strongly tends to prove actual fraud in the transaction between Story and Johnson, but regardless of that contention it is insisted by said appellant that the transaction in question was a constructive fraud, or a fraud in law as against the claims of existing creditors, and by reason thereof he, Edwards, is entitled to the proceeds arising from the sale of Johnson's membership in the board of trade.

With care we have examined the evidence in this case, and while it is conflicting, we are of the opinion that the finding of the court is justified from the facts in evidence. It appears that the relations of attorney and client had, prior to the transaction in question, existed between Story and Johnson, and that Johnson owed Story for past serv-

ices; that Johnson owned and held in his own name a membership in the board of trade of Chicago; that some time in 1899 he became financially embarrassed and was unable to pay his assessment as member of the board of trade, and was in danger of losing his membership therein; that on or about the second day of January, 1900, Story advanced him $96; that Johnson stated to Story that he desired to dispose of his said membership. Story answered that he would buy it, provided his claim for attorney's fees was allowed. Johnson testified as follows:

"Story claimed that I was owing him $300 for services rendered in two cases, and we finally agreed that we would call the amount $275, and then I transferred to him the membership, and I had an understanding with him on that day, that in case my membership was sold I was to get $650 net; it was upon the basis of $950 for the membership, and $650 was the amount that Story was to pay me, and he was to furnish the bond necessary before a transfer on the books of the board of trade, and I was to have the money as I wanted it."

At the request of Story, Johnson agreed to assist in reselling the membership. Johnson called upon a broker, said Booth, and offered the said certificate of membership, and then told Booth that he was acting in behalf of Story, and Story testifies that Booth told him that Johnson had likewise told him that Story was the owner of the said certificate. A written transfer of the certificate of membership was made on the eighth day of January, 1900. Story, much of the time thereafter, and prior to March 20th, was physically unable to be present at his office, and told his son to pay Johnson from time to time as he might call for the money, so that when the various sums advanced prior to March 20th to Johnson, were aggregated, it was found that they more than paid Johnson the price agreed upon for the membership.

The broker, Booth, in several interviews with Story, personally and over the telephone, finally reported that he had found a purchaser, and several weeks were spent by Story in negotiating with surety companies for the bond required for the transfer to Booth's purchaser. On the 20th of

March the broker sent for Story to go to the board of trade to effect a transfer of the certificate of membership to the purchaser, said DuRuyter, and on this day, at the office of the secretary of the board of trade, met Story, Booth, Johnson and DuRuyter. Story was not familiar with, but was told what were the formalities that were necessary to effect a legal and formal transfer of a membership in the board of trade. The necessary signature was placed upon the book kept by the secretary of the board of trade and a transfer of the certificate of membership on the books was then made and DuRuyter became and has since remained a member. Story then and there asked for the pay for the certificate of membership from Booth, the broker, and from DuRuyter. Story testified:

"I told Booth I wanted a certified check; he said he would probably get me the currency. I asked for the money and when I found they had got the start of me I went to the officers of the board and protested; think I sent them a written protest. The day before this membership was transferred I demanded the money of Mr. Booth and demanded it of him on the morning and the afternoon of that day. I objected to the transfer of that certificate until I got my money. I demanded my money before and after the membership was transferred. After I got this assignment I notified the board."

It appears that after these formalities of assignment had been made, that Booth pretended to send a messenger to his office to get the currency, but before the messenger returned, Booth was served with a garnishee summons in the said garnishment case of Edwards. Story testified that he knew nothing about the alleged judgment in the Edwards case before the serving of summons in the said garnishment suit. Booth states that the secretary of the board of trade directed him not to transfer the membership except in the presence of Story. So soon as the transfer of the membership had been made, and while they were waiting for the messenger to come with the cash amount, a deputy sheriff served Story with a writ in the Edwards garnishment proceedings. Booth testified on cross-examination that he had promised Story a certified check. In the answer of Booth,

garnishee, to certain interrogatories, he denies that he is or was in any manner indebted to said Johnson or that he has or ever had in his possession any moneys, choses in action, credits and effects owned by or due said Johnson.

It was certainly a very peculiar coincidence that Story and a deputy sheriff should meet late in the afternoon at the office of the secretary of the board of trade. The conclusion can scarcely be resisted that the meeting was premeditated by certain parties, one of whom was not Story. Story was certainly led into the trap.

Appellants suggest that when Johnson would sell his membership, Story was to be paid the amount of his bill and the balance was to be turned over to Johnson, figuring upon the basis of $950. If suspicion of this kind may be entertained, we, however, find no sufficient evidence upon which to base it. Story is found in possession of a written assignment of the certificate executed long prior to the 20th day of March, 1900, and he has advanced all the money which Johnson says that he was to receive for his membership.

It is true Johnson's statement of the understanding between him and Story is somewhat confused, and that he does use the expression that Story was to pay him when the certificate was sold, but he also later explains this statement by saying that he, Johnson, was to receive his money as he wanted it; and he proceeded to want it before the actual transfer on the twentieth day of March. So we are unable to accept appellants' proposition that Johnson was entitled to receive more than $950.

Again, there is not the slightest evidence that Story or Johnson was attempting to remove the membership or the proceeds of its sale out of the reach of creditors.

Fraud is never to be presumed, but must be affirmatively proved by the parties alleging the same. Such proof must be clear and satisfactory and must be superior to that adduced to controvert it. Schroeder v. Walsh, 120 Ill. 403; Brady v. Cole, 164 Ill. 116; Johnston v. Hirschberg, 185 Ill. 445.

Even if Johnson was not in good faith in making the sale, it is not shown that Story was guilty of fraud.

To impeach a conveyance for fraud, both vendor and vendee must be shown to have intended to commit fraud. Union National Bank v. State Bank, 168 Ill. 256.

From an inspection of the record, we are of the opinion that a *bona fide* sale and assignment of the membership in question was made by Johnson to Story on or about the eighth day of January, 1900, and that Story paid Johnson the full contract price therefor long prior to the twentieth day of March, 1900, the date of service upon Story of the summons in the garnishment proceedings. Counsel urge upon our attention that an assignment for the benefit of a particular creditor with a reservation of any benefit or advantage to the assignor is fraudulent as to the creditors of the assignor. Holding, as we do, there was no reservation of any benefit or advantage to Johnson in the assignment to Story, and that the assignment to Story was not intended simply as a pledge or security, we shall not further consider this portion of the argument.

It is claimed by appellee, Story, that there is not sufficient evidence to prove the existence of the alleged judgment in favor of the said Edwards or the proceedings thereunder, but it will be unnecessary for us to extend this opinion with a review of this part of appellants' case. The sale of the membership certificate was made by Story through Johnson to DuRuyter, and DuRuyter paid the money to Booth to be paid over at once to Story, the recognized owner and party who was entitled to the money, and it should have been paid him and not held to pay the debt of Johnson.

The judgment of the Circuit Court is affirmed.

105 439
r208 551
105 439
s115 173

People ex rel. v. The West Chicago St. R. R. Co.

1. FREEHOLD—*Involved in an Attempt to Compel Owner of Land Under a River to Lower Its Tunnel Therein.*—A freehold is involved in an attempt of the city of Chicago to compel the owner of land under the Chicago river to lower its tunnel four feet, and thus deprive it of all right and opportunity to use said four feet.

Mandamus.—Error to the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge presiding. Heard in the Branch Appellate Court at the October term, 1902. Dismissed. Opinion filed January 16, 1903.

GRANVILLE W. BROWNING, attorney for plaintiff in error; CHARLES M. WALKER, corporation counsel, of counsel.

W. W. GURLEY, JOHN P. WILSON and CHARLES S. BABCOCK, attorneys for defendant in error.

MR. PRESIDING JUSTICE WATERMAN delivered the opinion of the court.

This is an appeal from an order of the Circuit Court refusing to award a mandamus asked for by plaintiff. Defendant moves to dismiss the appeal, claiming that the proceeding involves a franchise, a freehold, and the construction of the constitution of this state.

From the record here filed it appears that defendant, being the owner of the land on each side of the Chicago river at a certain point between Madison and Twelfth streets and desiring to construct a tunnel under said river between the banks thereof owned by it, the tunnel to be used for the purpose of its business as a common carrier, obtained on the 2d day of April, 1888, from the city of Chicago, an ordinance whereby there was granted to it the right to construct such tunnel for such purpose; and that thereupon it did proceed to construct said tunnel and to place tracks, therein connecting with its railroad tracks upon the east and west banks of said river, at great expense, namely, more than one million dollars; that March 3, 1899, by an act of the congress of the United States, a survey and estimate

of the cost of a channel twenty-one feet deep from the mouth of said river to the stock yards on the south branch and Belmont avenue on the north branch, exclusive of cost of removing or constructing bridges or piers or lowering tunnels, was ordered, and the depth of twenty-one feet for such channel was adopted; such act providing that all the work of removing and reconstructing bridges and piers and lowering tunnels necessary to permit a practicable channel of such depth should be done by the city of Chicago without expense to the United States. In the petition for a mandamus it was set forth that the United States Government has taken steps to deepen the channel of the river in accordance with said act; that thereafter by an ordinance of the city of Chicago it was ordered that the West Chicago Street Railway Company, at its sole cost and expense, and without cost, damage, loss or expense of any kind whatsoever to the city of Chicago, proceed to lower the tunnel under the south branch of the Chicago river at or near Van Buren street, so as to provide for a clear depth of water above said tunnel of twenty-one feet at all times, being the same tunnel theretofore constructed by the said West Chicago Street Railway Company under an agreement dated April 2, 1888, between said West Chicago Street Railroad Company and the city of Chicago, and an ordinance passed by the city council of Chicago, April 2, 1888.

The West Chicago Street Railroad Company refused to obey and proceed in accordance with said order of the city council, and a petition for mandamus was filed by the city of Chicago, asking that said West Chicago Street Railroad Company be commanded to proceed to lower its said tunnel at or near Van Buren street, in accordance with the ordinance of the city of Chicago heretofore mentioned.

The petition set forth, among other things, that during the last ten or twenty years there has been a gradual increase in the size and tonnage of vessels used on said Chicago river and that to accommodate the large vessels now in use upon the Great Lakes of Chicago, it has become necessary to increase the depth of the river and remove all obstructions to the navigation thereof.

The petition for mandamus sets forth that since the construction of said tnnnel the depth of water in the Chicago river over said tunnel varies from seventeen to eighteen and three-tenths feet and that many modern vessels of large capacity can not ascend said south branch of the river owing to the fact that the water therein is not of the uniform depth of twenty-one feet; that the said tunnel forms an obstruction across the river which prevents vessels of modern draft of the largest capacity from crossing said tunnel and that in consequence thereof a large portion of the ships on the Great Lakes have been prevented from making use of said Chicago river, and that the amount of tonnage entered at the port of Chicago was much less during the year 1899 than in preceding years.

Upon this motion to dismiss the appeal the question of the power of the city of Chicago to compel defendant at its expense to so lower its tunnel that there shall, upon the top of the same, be at all times a depth of twenty-one feet is not involved. If the proceeding for mandamus under consideration involves a franchise or a freehold, then this court has no jurisdiction over this case and the appeal should have been taken to the Supreme Court.

It is conceded by plaintiff that defendant, having title in fee simple to the banks of the stream under and between which the said tunnel is, defendant has a freehold estate in and to the premises between said banks beneath the bottom of the said river; but plaintiff contends that depriving defendant of all or a portion of the space beneath the bottom of said river now occupied and used by defendant will not be depriving it of a freehold estate, and that under the petition for mandamus a freehold estate is not involved, because plaintiff urges defendant's right and title to the land beneath the present bottom of the Chicago river now occupied by the tunnel belonging to defendant is subject to the right of the public to use said river for purposes of navigation, and the right of the public to so use said river is not merely the right to use it in such manner as the demands of navigation forty years ago required, but to use

it in such manner as modern vessels and modern methods of carrying on commerce upon navigable streams now demands or may hereafter demand.

Plaintiff says that no attempt is being made to deprive defendant of its tunnel and no claim is made by plaintiff that defendant has not a right to a tunnel at that place; that changing the level of a tunnel is not taking away a tunnel and that under the statute defendant must maintain its tunnel at such a level as not to interrupt the navigation of the Chicago river. It is manifest that if a freehold is not involved in an attempt to compel the lowering of its tunnel four feet and in depriving it of all right and opportunity to use said four feet, a freehold would not be involved in an attempt to compel it to lower its tunnel twenty feet and to deprive it of all right to use or occupy twenty feet of the space beneath the bottom of said river now occupied by said tunnel. That really sought and attempted to be accomplished by the proceeding under consideration is not to make use of a navigable stream, but to create an artificial stream for the purposes of navigation. The Chicago river was and is in its natural state a navigable stream, having a certain depth and a certain width, varying to some extent with the seasons of the year and the condition of the water. To such navigable stream the public have rights. The owners of land abutting on such stream hold the same subject to the rights of the public for the purposes of navigation.

It, under the demands of commerce, has sometimes been found necessary to artificially increase the width of navigable streams by removing the natural and permanent soil on the sides thereof, and thus increasing the width to which the navigable water extends. Our attention has not been called to any case and we are not aware of any in which it has been held that the public has a right to so remove such permanent shores without compensation to the owners of such banks, or that in the attempt to take such banks a freehold was not involved. If the owners of the permanent shores of a navigable stream may, without compensa-

tion, be deprived of four feet of such shores, we see no reason why, should the demand of commerce require, they may not be deprived of 200 feet for the purpose of making the navigable waters of the stream five or six hundred feet in width and thus capable of accommodating such vessels as now sail upon the ocean.

As applicable to the present motion we are able to perceive no difference between a removal of the fixed banks of a navigable stream for the purpose of navigation, and removing the fixed bottom of a stream for the purpose of increasing its navigability; in either case the party having the freehold estate in such sides or such bottom is deprived thereof and if the attempt to so take is resisted by him a freehold is involved. Plaintiff contends in the case at bar the writ of mandamus asked for would not interfere with the full and absolute enjoyment of the land under the river by the defendant, or with the full and perfect enjoyment by the plaintiff of a tunnel at that point that should not interfere with navigation.

At the present time defendant has a freehold estate in and to the land beneath the bottom of the Chicago river now occupied by its tunnel. It is now in the full, absolute and exclusive enjoyment of such land. By the proceeding under consideration it is proposed to deprive it not only of such full, absolute and exclusive enjoyment, but to deprive it of any use or enjoyment not common to the entire public for the purposes of navigation. The tunnel now existing in this space certainly can not there remain when that space is occupied by water used for the purpose of navigation.

By the present proceeding there is not involved any question of the right of the public, proceeding under the law of eminent domain, to condemn and appropriate the freehold estate of defendant in and to the space now occupied by it under the Chicago river. The sole question upon the present motion is whether an appeal from the judgment of the Circuit Court should have been taken to the Supreme Court, that depending upon whether a franchise or free-

hold is involved in the petition for mandamus filed by appellant.

In Commissioners of Highways v. Chicago and Northwestern Railway, 34 Ill. App. 32, being an appeal from a decree entered upon a bill in equity seeking to enjoin the opening of a highway which had been surveyed and laid out by the plaintiff for public and private use between a dwelling house of one Cornelius Vroom and a public highway crossing the track and one hundred feet right of way of the defendant, which crossing had been attempted to be condemned by the commissioners of highways, it was held that a freehold was involved and the appeal to the Appellate Court was therefore dismissed; the court in that case calling attention to the fact that in Chaplin v. Commissioners of Highways, 126 Ill. 264, the Supreme Court, overruling Lucan v. Cadwallader, 114 Ill. 285, and Eckhart v. Irons, 114 Ill. 469, held that a perpetual easement did constitute a freehold. Defendant's estate in the land beneath the Chicago river is either a pure freehold or it is under the ordinance granting to it the right to there construct and use a tunnel, a perpetual easement and thus a freehold. Plaintiff contends that defendant's tunnel is an impediment to navigation and so a purpresture, and therefore that the enforced removal thereof is not an interference with a freehold. Before defendant's tunnel was constructed and before any ordinance of the city existed, giving it the right to make such tunnel, place tracks therein and connect them with its tracks already existing in the west and south divisions of the city, defendant had by virtue of its ownership of the opposing river banks, an estate of freehold in and to the land where its tunnel now is. By the present proceeding it is proposed to deprive it of such land and give to it only such right to use the same for purposes of navigation as each and every member of the public under the changed condition of such freehold estate will have.

The wisdom of changing the course of the Chicago river by constructing a navigable stream therefrom at Twelfth or Twenty-second streets to Lake Michigan, has been much

discussed by engineers and the public. Should it be thought wise to do so, and, by legislative act, with the concurrence and under the order of the city council, such changes were to be made and such stream constructed, it would hardly be contended that the taking of lands necessary for the purpose of such new course of the river was not the taking of a freehold.

We are of opinion that the taking of the freehold estate of defendant to the land beneath the natural bottom of the Chicago river is likewise the taking of a freehold estate, and that consequently in this appeal there is involved a freehold and that the appeal taken to this court must be dismissed.

Lizzie Lemker v. Emily L. Kalberlah.

1. RECEIVERS—*Appointment Pendente Lite a Matter of Discretion.*—While it is true that the appointment of a receiver *pendente lite* is a matter of discretion, it is not a matter of arbitrary discretion. Facts must exist and be made to appear to the court warranting the exercise of the power and justifying the taking into its possession of the property in controversy. It is essential that the complainant should show, first, either a clear legal right in himself to the property in controversy, or that he has some lien upon it, or that it constitutes a special fund out of which he is entitled to the satisfaction of his demand, and secondly, it must appear that possession of the property was obtained by the defendant through fraud, or that the property itself or the income from it is in danger of loss from the neglect, waste, misconduct or insolvency of the defendant.

2. SAME—*What Plaintiff Must Show.*—The plaintiff must show a case of adverse and conflicting claims to the property and must also show some emergency or danger of loss demanding immediate action, and that his own right is reasonably clear and free from doubt. If the dispute is as to title only, the court very reluctantly disturbs possession by the appointment of a receiver. Insolvency of the defendant will not alone warrant a court in appointing a receiver. It must also appear that the plaintiff has a probable cause of action against the defendant and that the benefit to result from his recovery will either be wholly lost or substantially impaired by reason of such insolvency, unless a receiver is appointed.

3. SAME—*Court of Equity Proceeds with Caution Against a De-*

fendant in Possession.—As against a defendant in the possession and enjoyment of real property, which is the subject-matter of litigation, a court of equity always proceeds with extreme caution in appointing a receiver.

4. SAME—*Appointment Must be Necessary to Preserve Some Particular Property for Such Parties as Shall be Entitled to the Benefit Thereof.*—A receiver should be appointed in no case unless it is made to appear that there is an imperative necessity for the step to preserve some particular property for such parties as shall be entitled to the benefit thereof.

5. SAME—*Where Party in Possession is Insolvent and Plaintiff's Claim is Not Clear.*—When a plaintiff's claim to real estate is not clearly made out, a receiver will be refused when the only reason urged for the appointment is the insolvency of the party in possession.

6. SAME—*Power of Appointment Should be Cautiously Exercised.*—The power of appointing receivers over real property for its better protection and to secure the rents and profits *pendente lite* is regarded as an extremely delicate branch of equity jurisdiction and one whose exercise should be guarded with the utmost caution. Courts are extremely averse to any interference *in limine* with the possession of real estate by a defendant claiming under legal title; and equity will interpose a receiver as against such possession only in cases of great emergency, the general rule being that conflicting questions of title should be determined in courts of law.

7. SAME—*As Against One in Possession—When One Will be Appointed.*—In actions affecting the title to real property a receiver, as against one in possession, will be appointed only in behalf of one having an acknowledged interest or when there is a strong probability of his ultimate recovery.

Bill for a Receiver over Real Property.—Appeal from the Superior Court of Cook County; the Hon. JESSE HOLDOM, Judge presiding. Heard in the Branch Appellate Court at the October term, 1902. Reversed. Opinion filed January 16, 1903.

ARNOLD TRIPP, attorney for appellant.

GEORGE W. BROWN, attorney for appellee.

MR. PRESIDING JUSTICE WATERMAN delivered the opinion of the court.

This is an appeal from an order appointing a receiver to take possession of, manage and control certain described real property in the city of Chicago.

The bill filed by appellee, under which the order for a receivership was made, sets forth that Minnie Jansen, mother

of the complainant, was at the time of her death seized in fee simple and in possession of certain described real estate in the city of Chicago; that complainant worked in a cigar store and earned $2,000, which she gave to her mother, who therewith built a house upon a portion of the said premises; that Minnie Jansen died October 24, 1902, and that the said described premises became by means of her death vested in the complainant, Frank C. Jansen and Fred A. Jansen, the only children and heirs at law of the said Minnie Jansen; that Minnie Jansen was for a long time previous to her death ill from tumor of the stomach, in great pain, and frequently under the influence of morphine and not in possession of her faculties or able to transact ordinary business; that on the 20th day of October, 1902, deeds were placed of record purporting to convey said premises from Minnie Jansen to Lizzie Lemker. Copies of such deeds are set forth in the bill, which are in the statutory form of warranty deeds, dated and acknowledged on the 7th day of August, 1902.

The bill sets forth that the said deeds were never delivered to Lizzie Lemker until October 20, 1902, and that Minnie Jansen was not of sound and disposing mind when she executed and delivered said deeds; that no consideration was paid for them; that Lizzie Lemker was a sister of the said Minnie Jansen and had great influence and control over her and that none of the children of Minnie Jansen lived in the house with her; that the complainant was married in 1896 and her two brothers worked in other cities; that the said deeds are null and void and clouds upon the complainant's and her brothers' title to the property described therein; that the premises are improved with frame houses, one known as 927 North Spaulding avenue, renting for $12 per month, the other as 926 North Troy street, renting from $10 to $11 per month; that complainant has been appointed administratrix of the estate of Minnie Jansen, deceased, and has filed her bond in the Probate Court of Cook County; that Lizzie Lemker, grantee in said deeds, has no property or estate, save what she

is in possession of belonging to the estate of Minnie Jansen, and that she is irresponsible; that she threatens to collect the rents of said premises, and if she should do so they would become lost to the complainant and her brothers; that Minnie Jansen was in possession of said premises up to her death and collected the rents therefrom; that complainant and her two brothers are each seized of an undivided one-third of said premises, and the complainant asks that a partition of said premises be made between her and her said brothers.

Lizzie Lemker answered said bill denying that the complainant or any of the children of said Minnie Jansen ever brought home any of their wages earned from the cigar business and gave the same to their mother, and denying that any money belonging to any of the children of said Minnie Jansen was used in the purchase of any of the property described in the bill.

Appellant further answering said that Minnie Jansen was ill for a long time prior to her death, but that she was in the possession of her mental faculties and able to transact all ordinary business, almost up to the moment of her death; that on the 7th of August, 1902, and not on the 20th of October, deeds were executed by said Minnie Jansen to this defendant conveying the premises in question to her; that said deeds were executed by the deceased with full knowledge of their contents and while she was in full possession of her mental faculties, and were duly acknowledged by her on the 7th of August, 1902, and after the execution thereof were delivered by Minnie Jansen to this defendant, intending to convey to this defendant the absolute fee simple title to said premises; that the conveyance of said premises to this defendant was the express wish of said deceased; that she directed the execution of said deeds independent of any advice or suggestions of this defendant or any one in her behalf; that said Minnie Jansen was of sound and disposing mind when she executed said deeds and delivered the same; that it was not intended that any sum of money whatever should be paid by this defendant

for said property, on the contrary, said deceased stated at the time of the execution of said deeds that said property was given to this defendant in consideration of the care taken of and services rendered by this defendant to said Minnie Jansen during the lifetime of said Minnie Jansen, and during her long-continued spell of illness that she endured just prior to the time of her death; that during her whole sickness and for many years prior to that time her children never visited their mother, paid no attention to her whatsoever, gave her no care during her last illness and only came to see her when they wanted money or other favors.

Defendant further denies that she had control over her sister, but says that it is true that none of the children of Minnie Jansen lived in the house with her, and further denies that the complainant or her brothers are entitled or have any interest in the said premises or any of the rents thereof; and denies that they are entitled to any partition of said premises. This answer was subscribed and sworn to by Lizzie Lemker on the 7th day of November, 1902.

In support of said answer six affidavits were filed. J. H. Greer, being sworn, says:

"He is a physician and has for seventeen years been well acquainted with Minnie Jansen; that he attended her from March to October, 1902, up to the time of her death and well remembers the occasion of the execution of the deeds August 7, 1902; that at that time and prior thereto and up to almost the time Minnie Jansen died, she was in full possession of her mental faculties, and knew what she was doing; that she consulted with affiant in reference to making over the property in controversy to her sister; that at first she wanted to make a will, but afterward concluded it was a great deal better to make a deed direct to Lizzie Lemker, her sister, because, as she expressed it, they might attempt to contest a will, while a deed conveyed the property absolutely. Affiant advised her that if she so felt, to make a deed direct rather than a will; that she was anxious, and often expressed herself that she wanted what little property she had left to go to her sister, Lizzie Lemker, and that she wanted no part of her property to go to any of

her children. Affiant is positive that at the time of the execution and delivery of the deeds, August 7, 1902, the deceased was in full possession of her faculties, and able to transact all business."

Jacob Kenne, sworn, says:

"That he is a notary public; that on August 7, 1902, he prepared the deeds in controversy, and took them to the home of Minnie Jansen for execution; that he saw Minnie Jansen, who, at that time, was in the possession of her faculties, and able to transact business; that as notary public he explained the contents of the deeds to her; that she understood them, and expressed an anxiety that the property should be transferred to her sister; that after affiant had explained the contents of the deeds to her, she expressed satisfaction with the same, and acknowledged both of the deeds; thereupon affiant, as notary public, attached his certificate of acknowledgment thereto; that the execution of the deeds was without any interference whatever from anybody, and was the free act and deed of Minnie Jansen."

Charles Behrens says:

"He lived in the flat occupied by the deceased; that he roomed there for one and one-half years; he was well acquainted with deceased, saw her daily, conversed with her daily up to the time of her death; on many occasions she expressed herself that she desired her property to go to her sister; that at no time shortly prior to the death of Minnie Jansen was she in an unsound state of mind; on the contrary, she was of sound mind and memory, knew what she was doing and was capable of transacting all ordinary business and affairs; that deceased spoke to affiant with reference to the transfer of the property; that he knows that the deeds were made by the deceased with her full knowledge and consent, and that no undue influence of any kind was used on said deceased to induce her to make these deeds, and that at the time she was in full possession of her mental faculties."

Margaret Sullivan, Minnie Mitchell and Emily Korth, the latter being one of the matrons of the Chicago police station, each state that they well knew Minnie Jansen, saw her during her last illness and know that she was on the 7th of August, 1902, when the said deeds were executed, of sound mind and memory, knew what was being said to her and what she was doing, readily answered questions put

to her, knew the contents of the deeds, and prior thereto expressed herself that it was her desire that the property should go to her sister, Lizzie Lemker.

Emily Korth also says that she had known the entire family of Minnie Jansen for upward of twenty years; that on many occasions, while talking the property matter over with the deceased, she stated to affiant that whatever property she had she intended to deed to her sister, defendant, but she did not intend that any of her children should have any of the property.

While it is true that the appointment of a receiver *pendente lite* is a matter of discretion, it is not a matter of arbitrary discretion; facts must exist and be made to appear to the court warranting exercise of the power and justifying taking into its possession of the property in controversy. It is essential that the complainant should show, first, either a clear legal right in himself to the property in controversy, or that he has some lien upon it, or that it constitutes a special fund out of which he is entitled to the satisfaction of his demand, and secondly, it must appear that possession of the property was obtained by the defendant through fraud, or that the property itself or the income from it is in danger of loss from the neglect, waste, misconduct or insolvency of the defendant.

The plaintiff must show a case of adverse and conflicting claims to the property and must also show some emergency or danger or loss demanding immediate action and that his own right is reasonably clear and free from doubt. If the dispute is as to title only, the court very reluctantly disturbs possession by the appointment of a receiver. Insolvency of the defendant will not alone warrant a court in appointing a receiver. It must also appear that the plaintiff has a probable cause of action against the defendant and that the benefit to result from his recovery will either be wholly lost or substantially impaired by reason of such insolvency, unless a receiver is appointed.

As against a defendant in the possession and enjoyment of real property which is the subject-matter of litigation, a

court of equity always proceeds with extreme caution in appointing a receiver. High on Receivers, Secs. 11–18.

A receiver should be appointed in no case unless it is made to appear there is an imperative necessity for the step to preserve some particular property for such parties as shall be entitled to the benefit thereof. First National Bank v. Gage, 79 Ill. 207–209; 20th American & English Encyclopedia of Law, 1st Edition, pages 16 and 20.

When a plaintiff's claim to real estate is not clearly made out a receiver will be refused when the only reason urged for the appointment is the insolvency of the party in possession. 20th Am. & Eng. Enc. of Law, 1st Ed., page 39.

The power of appointing receivers over real property for its better protection and to secure the rents and profits *pendente lite* is regarded as an extremely delicate branch of equity jurisdiction and one whose exercise should be guarded with the utmost caution. Courts are extremely averse to any interference *in limine* with the possession of real estate by a defendant claiming under legal title; and equity will interpose a receiver as against such possession only in cases of great emergency, the general rule being that conflicting questions of title should be determined in courts of law. It was the established doctrine of the English chancery that the court would never exercise its extraordinary power by appointing a receiver over real property in behalf of a claimant out of possession, except in aid of an equitable title. High on Receivers, Secs. 553 and 554; Carrow v. Ferrior, L. R., 3 Ch. App. 719.

In actions affecting the title to real property a receiver, as against one in possession, will be appointed only in behalf of one having an acknowledged interest or when there is a strong probability of his ultimate recovery. High on Receivers, Secs. 556 and 557.

In the present case a receiver has been appointed upon a bill verified by the complainant only, and without a supporting affidavit, the material allegations in said bill being such that from an examination of the answer and affidavits in support thereof, it seems very probable that the com-

plainant can have no knowledge of the matters and things upon which her bill is predicated, save by information and belief. The bill, answer and affidavits presented to the court upon the application for a receiver, so far from making it appear probable that the complainant and her brothers are the owners of the property in question and entitled to a partition thereof, are the reverse. If, under such an exhibit as was made in this case, a receiver can be appointed and the possession of real property taken away from one who has a plain legal title of record thereto, we know not who can be said to be secure in the possession of real property or the rents arising therefrom.

Compared with many ownerships, the property in this case is of little importance. If, under a bill containing similar allegations and the same absence of supporting affidavits, an attempt had been made to take by the appointment of a receiver the Great Northern Hotel or the Ashland Block out of the possession of those in whose hands these properties now are and who have the legal title thereto, and in response to such bill an answer with affidavits accompanying it such as was filed in this case had been interposed, the proposition that under such circumstances a receiver would be appointed would have appeared startling.

At the bar of justice all men are equal. The same consideration is due to an attempt, by the appointment of a receiver, to take out of the hands of one having a plain legal title thereto the possession of a cottage worth but a thousand dollars, as to an endeavor to seize by the strong arm of the law properties worth millions. Upon allegations of the obtaining title to and possession of real property by fraud, it is not the case that the allegations of the bill only are to be taken into consideration. The answer with all accompanying affidavits and exhibits are to be put into the scale.

In the present case there is not an allegation that the property is being allowed to go to decay for want of proper care or is in danger of or has been sold for taxes, or that anything whatever claimed by the complainant can in any

event be lost, save rents, which, pending litigation, may be collected by the defendant, and as to such rents, it is not made to appear that they will amount to more than the taxes, insurance and proper care of the property will come to.

The order appointing a receiver is reversed.

M. R. Weidner et al. v. Catharine Mary Lund.
Same v. Catherine J. Zimmer.
Same v. A. W. Lund.

1. FREEHOLD—*Title to Real Property May be Determined in Action of Trespass Quare Clausum Fregit.*—The title to real property may be determined by a judgment rendered in an action of trespass *quare clausum fregit.*

2. RES JUDICATA—*Upon What the Doctrine Rests.*—The doctrine of *res judicata* does not rest entirely upon the fact that a particular proposition has been affirmed and denied in the pleadings, but rather upon the fact that such proposition has been fully and fairly investigated and tried, that the parties have had an adequate opportunity to say and propose all that they can in relation to it, and that the minds of court and jury have been brought to bear upon it and so it has been solemnly and finally adjudicated.

3. SAME—*Judgment Turns Only upon Those Things Concerning Which There Necessarily Must Have Been Adjudication.*—The judgment in a trial does not turn upon all that was controverted but only upon those things concerning which there necessarily must have been adjudication.

4. SAME—*Matters Not Concluded by Judgment.*—Matters which can only be inferred by argument or inference from a judgment are not concluded by a judgment.

Trespass, *quare clausum fregit.*—Three cases consolidated. Appeals from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Reversed and remanded. Opinion filed January 16, 1903.

I. T. GREENACRE and OTTO F. REICH, attorneys for appellants.

JOHN C. TRAINOR, attorney for appellees.

MR. PRESIDING JUSTICE WATERMAN delivered the opinion of the court.

This case originated in three actions of trespass begun before a justice of the peace. For the purposes of trial the actions were consolidated, substantially all the facts of one case being applicable to the others. The controversy arose out of the action of certain officers of the village of Dalton in removing fences, which the respective plaintiffs claim were upon land belonging to them; the village officers insisting that the fences were in a public street and constituting obstructions thereto which were by them properly removed. In other words, the plaintiffs insisted that the *locus in quo*, the place where the fences were, was a freehold belonging to them, respectively, while the defendants insisted that the *locus in quo* was a freehold belonging to the public, namely, to the village of Dalton, whose officers they were and in whose behalf they acted in removing the fences.

The justice of the peace having found and rendered judgment against the defendants, appeals were taken to the Superior Court, where the cases were tried as a consolidated action and the appeal to this court is in like manner one appeal.

Appellee in this court has moved to dismiss the appeals, because, as he insists, a freehold is involved and therefore the appeal should have been taken to the Supreme Court. The title to real property may be determined by a judgment rendered in an action of trespass *quare clausum fregit*. Outram v. Morewood, 3 East, 346; King v. Chase, 15 N. H. 9; Lentz v. Wallace, 17 Pa. St. 412.

While the action before the justice of the peace was only of trespass to recover damages for an alleged unlawful trespass upon real property, yet in such action the real question, issue, and the fact upon which the decision of the justice necessarily was based, was, in whom was the freehold? in the public, represented by the defendant, or in the plaintiffs?

The doctrine of *res judicata* does not rest entirely upon the fact that a particular proposition has been affirmed and denied in the pleadings, but rather upon the fact that such

proposition has been fully and fairly investigated and tried, that the parties have had an adequate opportunity to say and propose all that they can in relation to it, and that the minds of court and jury have been brought to bear upon it and so it has been solemnly and finally adjudicated. Black on Judgments, Sec. 614.

The proposition which has thus been presented and adjudicated must have been one that, under the proceedings, there was necessarily judgment upon. And such necessary adjudication and judgment may be shown by the evidence presented in the cause, as well as by the pleadings. There is, however, the distinction to be always borne in mind between facts in controversy and facts in issue. In most trials many facts are in controversy, while but one or a few facts are actually adjudicated upon; that is to say, the judgment does not turn upon all that was controverted but only upon those things concerning which there necessarily must have been adjudication in order that the judgment finally found could be arrived at. Potter v. Baker, 19 N. H. 166; Bigelow on Estoppel, 5th Edition, 99; Freeman on Judgments, Sections 258-259; Burt v. Sternburgh, 4 Cowen, 559.

Matters which can only be inferred by argument or inference from a judgment are not concluded thereby. Black on Judgments, Sec. 612.

Had this action been originally brought in the Superior Court, a declaration in trespass *quare clausum fregit* been filed to which there had been a plea of *liberum tenementum*, and the same evidence there produced that was given upon the hearing of the present case in the Superior Court, an appeal from the judgment therein rendered would not have lain to this court, but must have been taken to the Supreme Court; because such action, while sounding in damages, would necessarily have involved a freehold, and by the judgment of the Superior Court the freehold title of either plaintiff or defendants would have been established; as the same pleas might in the action before the justice of the peace have been orally stated, and were upon the trial of

the present case actually stated in the Superior Court, and the verdict of the jury and the judgment of the Superior Court turn upon the question of whether the freehold in dispute was that of the plaintiff or the defendant, why is not a freehold involved in the present case? Why should not the appeal, as appellees contend, have been taken to the Supreme Court? The Superior Court had in the present case, upon the appeal thereto from the justice of the peace, jurisdiction to do only that which the justice of the peace might have done. In other words, upon an appeal from a justice of the peace to the Supreme or Superior Court, such Appellate Court has and can exercise in such action only such jurisdiction as to the extent of the remedy afforded and the effect of its judgment, as the justice of the peace had in the action before him. It therefore follows that if by the judgment of the justice of the peace neither party could have lost or gained a freehold, by the judgment of the Superior Court rendered upon appeal from such justice, a freehold can not be established in either party.

While it is true that in the trial before the justice as upon the trial in the Superior Court, the ultimate fact to be determined, namely, whether the defendants had trespassed upon the land of the plaintiffs, depended upon whether the land or the place at which the alleged trespass was said to have been committed, was the freehold estate of the plaintiffs or the defendants; and such fact was one which in that case it was proper for both the justice of the peace and the Superior Court upon appeal to hear evidence concerning, and pronounce judgment as to; yet the effect of such judgment, begun before a justice of the peace, was not what it would have been if the action had been begun in the Superior Court, because under the statute of this state the judgment of a justice of the peace can not give or take away a freehold; necessarily the judgment of the Superior Court upon appeal from said justice can not do this.

Upon an action before a justice of the peace for an alleged personal assault the defendant might reply that, true, he did lay violent hands upon the plaintiff, but that he did so only

as sheriff of the county and in the discharge of his duties as such sheriff, to which the defendant might reply that the plaintiff was not at the time, etc., the sheriff of the said county, but that he, the defendant, was then and there the sheriff of such county. The justice of the peace, notwithstanding such pleadings, might go on to hear evidence for the purpose of determining whether a personal assault had been made, and in the determination of such controversy might hear evidence as to whether the plaintiff was at the time of the alleged assault sheriff of the county, and might, in effect, by his judgment for the plaintiff or for the defendant, pass upon such question; yet neither the reception and hearing of such evidence, nor the judgment would be in another action an estoppel upon either party as to the question of who was the sheriff of the county, because the justice of the peace would have had no jurisdiction to determine such question.

In Pitts v. Looby, 142 Ill., page 534, the Supreme Court say:

"It may be admitted that a freehold was incidentally involved in the litigation, but no judgment could have been rendered that either party was possessed of a freehold under any possible evidence, for the plain reason that the jurisdiction of the justice of the peace did not extend that far, but was limited to the damages to real property to be recovered, and in this case is entirely different from an action of trespass *quare clausum fregit* in the Circuit Court and a trial on the plea of *liberum tenementum*, since a freehold was only incidentally involved. The appeal from the Circuit Court was properly to the Appellate Court."

We do not regard the case of Town of Brushy Mound v. McClintock, 146 Ill. 643, or that of the Village of Dolton v. George A. Dolton, 196 Ill. 154, as inconsistent with the conclusion to which we have arrived. It is, to be sure, the case that the case of the Village of Dolton v. George A. Dolton grew out of an action brought before a justice of the peace, and was concerning the very road now under consideration, and the same kind of a trespass, but the case reported in the 169 Illinois, at page 154, was upon a decree in chancery, in which decree, in express terms, the complainant in

the bill was found to be the owner in fee simple of the real estate in controversy. In the present case, as neither party can gain or lose a freehold by the decision of this case, the appeal was properly taken to this court.

Near the close of the trial in the Superior Court the following occurred:

"Mr. Trainor: I would like to suggest now, if Your Honor please, the plaintiffs have had their innings and the defendants have had theirs, and the jury have sat here and heard all of this evidence; I would like to suggest now that this jury be permitted to go out there and look over this road.

The Court: No.

Mr. Trainor: I will say that the plaintiffs will pay either half or the whole of the expense of this jury going and then, Your Honor, they can see who is right and who is wrong. Now, that is a fair suggestion, Your Honor, and they do not have to depend upon the evidence of witnesses; they can see it with their own eyes whether it is a public road and whether it has been used from the west end to the east end.

The Court: This jury has been here now, this is the third week, and it would take half a day for them to go out there.

Mr. Trainor: This litigation has been going on ever since last Wednesday, and I would like to have this jury see the premises. I will agree to cut one hour of my argument short—

The Court: You will likely have to do your arguing within the hour.

Mr. Trainor: Do I understand that the jury will not be permitted to go out to view the premises?

The Court: I will not send the jury out. Proceed.

Mr. Trainor: Every lawyer in this court here has to do as Your Honor directs, and I always submit with all courtesy on my part to the direction of the court.

The Court: Proceed.

Mr. Trainor: Do I understand then that my offer is rejected?

The Court: I will not send the jury out there unless you show me that I must. There are certain cases where it is almost an absolute necessity for the jury to see the premises, but I hardly think this is one of them. Proceed with your rebuttal.

Mr. Trainor: You are the judge here, but would not it be better for this jury to go out there to see this road? I can not say to the court that he must send this jury out, but why would it not be proper to go out and see this road; to have this jury see this road, and we will pay all the expenses of their going; that is as fair an offer as it is possible to make. We will pay all the expenses for their going.

The Court: Proceed with this rebuttal.

Mr. Trainor: I would like to suggest further, Your Honor, that the jury might congregate at an earlier hour in the morning and in that way save time. We would make arrangements for trains and get out there and see the road; they might congregate say at as early an hour as Your Honor might suggest—nine o'clock sharp—we would arrange for trains.

The Court: Will you kindly proceed with your rebuttal?

Mr. Trainor: I desire to except to the court's refusal to permit the jury to go out there; to the court's refusal of counsel's offer.

The Court: If you wanted the jury to go out there you should have made that a private matter between counsel and the court and agree as to who should pay the expenses.

Mr. Trainor: Well, suppose we both pay it, but I said we would pay all if the—

Mr. Greenacre: I object to any statements before this jury in regard to the payment of money for the expenses of a trip down there.

The Court: If you have any questions to ask this witness, you may proceed and ask them.

Mr. Trainor: I stated that we could both contribute to the expense of going out there and no one would be prejudiced thereby.

Mr. Greenacre: I object to counsel's remarks and ask for a ruling; the remark that he would pay the costs or let both sides contribute.

The Court: I simply will not permit this jury to go out there, proceed.

Mr. Greenacre: Will Your Honor give me the benefit of a ruling?

The Court: Yes.

Mr. Greenacre: I think it should be stricken out, all statements made in the presence of the jury in regard to payment of expenses.

Mr. Trainor: I do not see any harm where both sides pay one-half."

The case had been hotly contested, much evidence of a most contradictory character had been heard, many witnesses had testified; the record of such testimony embraces nearly 500 pages. The persistent and repeated offers of counsel for the plaintiffs to have the jury go out and view the premises, he, such counsel, in the presence and hearing of the jury repeatedly offering to pay one-half or all the expenses of such action, his argument before the jury that the personal inspection, which he requested should be ordered, would enable the jury to come to a conclusion without reference to the testimony of witnesses; and this repeated after his request had been denied, was such conduct that we think therefor the judgment of the Superior Court should be reversed.

Under the evidence, the case was not turning at all upon what the condition of the place where these fences were destroyed was at the time of the trial, but largely upon what the situation as to this alleged street, the use and occupancy of the same, had been by the public for fifteen years prior to the alleged trespass. We can not say, and we regard it as altogether likely that the jury may have thought from the persistent insistence of counsel for the plaintiff that they should be afforded an opportunity to see the place and thus to judge from their own inspection as to what the merits of the controversy were, that the defendants wished to conceal the truth and the plaintiff to have all the facts known.

The significance of instruction marked in the abstract "23," given at the instance of the plaintiff, is, probably by a *lapsus pennæ*, very uncertain. This same is true of instruction marked "14." The latter part of instruction marked "15," beginning "in order," is inconsistent with that which precedes these words. The first part of this instruction is misleading, and should not have been given in this case.

The judgment of the Superior Court is reversed and the cause remanded.

105 462
e218s 255

Chicago City Ry. Co. v. Daniel Osborne.

1. APPELLATE COURT PRACTICE—*May Always Consider the Sufficiency of the Evidence to Support the Verdict.*—The sufficiency of the evidence to support the verdict is always a proper subject for the consideration of this court, and if it finds the evidence is not sufficient to authorize the judgment, it is the duty of the court to reverse on that ground, and a performance of this duty is absolutely essential for the preservation of rights, where the judgments of this court are final and conclusive upon all questions of fact.

2. INSTRUCTIONS—*Where Evidence upon Which a Recovery is Asked is Slight.*—Where the evidence upon which a recovery is asked is slight or doubtful, the jury should be fully and correctly instructed on all questions of law.

3. SAME—*Where Evidence is Evenly Balanced.*—An instruction that if the evidence in the case is evenly balanced as between the contention of the plaintiff and that of the defendant on the material issues the jury should find the defendant not guilty, is properly given where, under the pleadings, evidence, and instructions as given, the jury could not have been mistaken as to what the material issues were.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Reversed and remanded. Opinion filed January 16, 1903.

Statement.—The appellee recovered a judgment in the Circuit Court of $7,000 against the Chicago City Railroad Company for personal injuries claimed to have been sustained by him while in the act of boarding one of appellant's cable railway cars on State street, at or near its intersection with Adams street in the city of Chicago. The declaration consisted of four counts, all substantially alike, in which it is averred that appellant's train, consisting of a grip and two passenger cars, stopped on the southwest corner of State and Adams streets for the purpose of permitting passengers to alight from and to board the train and which was the usual and customary place for that purpose; that while the train was standing still and while appellee in the exercise of ordinary care was in the act of boarding the last car on the front platform, and while he

had one foot upon the first step and his right and left hands grasping the handles thereof, appellee, by its gripman, negligently and suddenly started and put the same in motion before appellee had been given an opportunity safely to board it, by reason whereof he was thrown to the ground and injured, and said last car crushed the left leg of plaintiff so that the same had to be amputated between the knee and the thigh.

WILLIAM J. HYNES and WATSON J. FERRY, attorneys for appellant; MASON B. STARRING, of counsel.

W. D. MUNHALL, attorney for appellee.

MR. JUSTICE BURKE delivered the opinion of the court.

The sole averment of negligence in the declaration is that the car suddenly was started from the place where it had stopped, at or near the southwest corner of State and Adams streets, to permit passengers to alight from and to board it, without giving appellee proper and reasonable time to get on board.

To reverse this judgment appellant relies upon the following three grounds: First, the verdict is against the manifest weight of the evidence; second, error in the refusal to give proper instructions to the jury; third, improper and prejudicial remarks made by appellee's counsel in the presence and hearing of the jury. The sole issue of fact in this case is plain and well stated by counsel for appellee, whose statement is accepted by appellant and is as follows:

"The case resolves itself to the question: Was appellee endeavoring to board the car when it was at a stand-still at Adams street, as he claims, or did he attempt to get on at a point between 100 and 150 feet south of Adams street and while the car was in motion as appellant contends."

Adams and Quincy streets and Jackson Boulevard are at right angles to and extend west of State street. Quincy street is about 190 feet south of Adams street and Jackson Boulevard is about 194 feet south of Quincy street and

Quincy street between curbs is thirty-eight feet in width. Appellee claims that he attempted to board the train while it stood at Adams street. Appellant, on the other hand, claims that appellee did not attempt to board the train until after it had left Adams street and obtained a rate of speed which made it dangerous for appellee to make such attempt.

It is the duty of this court to reverse a judgment, if, after a review of the evidence, we find that it is not sufficient to authorize the judgment. If the verdict is manifestly and palpably against the weight of the evidence a new trial should have been granted. Witnesses for plaintiff and defendant substantially agree in saying that plaintiff lay north of and within about fifty feet of Quincy street, being 150 feet south of Adams street, while the plaintiff and his companion, McQuade, state that he lay on or near the north crossing of Quincy street. Having established with some clearness the position where plaintiff lay, to wit, about 150 feet south of Adams street and about forty or fifty feet north of Quincy street, we may proceed to determine from the record where lies the clear preponderance of evidence on the question, where did plaintiff attempt to board the car. Plaintiff and his colleague, who on this holiday had visited in company with each other one or two saloons just prior to the accident, state that plaintiff attempted to board the car while it was yet standing at Adams street, and to the same effect is the testimony of the two girls, Miss Hagin and Miss Roberts, who were sitting inside of the closed car, and to the same effect is the testimony of William Nagle, the witness who labored under so great a mistake as to testify that plaintiff, after the accident, lay about a car's length south of Adams street. On the other hand eight witnesses, none of whom were on the car, and who were not employes of the defendant company, testify that the plaintiff, in company with McQuade, ran toward the car after it had left Adams street and while it was in motion. McQuade succeeded in getting onto the car, but plaintiff, upon seizing hold of some part of the front portion of the

car, fell and was injured. The employes of the company state that plaintiff did not attempt to board the car at Adams street. Several of the witnesses testify that plaintiff and McQuade staggered as they walked and were under the influence of liquor. McQuade admits that he was not sober. To explain the fact that plaintiff was found near or within fifty feet of Quincy street, plaintiff and McQuade testify that after the feet of the plaintiff slipped and his right hand let go of the rod, he hung by his left hand and was dragged to the place where he lay. One of defendant's witnesses swears that Miss Hagin, immediately after the accident, told him that the plaintiff ran after and attempted to board the car when it was in motion. The conductor of the car in question states, and his testimony is corroborated, that he was on the rear platform of his car while it was standing at Adams street, and that after it started he went into his car and was near the middle thereof, collecting fares, when the outcry of accident was first made. The two girls, witnesses for the plaintiff, state that the car jerked and that the plaintiff then lost his grip and they shouted to the conductor to stop the car and he did so. Now in order to determine where the car must have been when this shouting took place and the prompt signal to stop was given, it is necessary to look into the evidence to find where the car actually stopped in response to this signal. The plaintiff's witness, Nagle, states that the rear end of an Archer avenue car was about three lengths south of Adams street when it stopped. But after careful comparison of the testimony of the various witnesses, it is found by the overwhelming preponderance of the evidence that the train did not stop until the rear end of the Archer avenue car had passed over and to the south side of Quincy street. So that if the plaintiff's witnesses are truthful and not mistaken as to the time and place when they first saw plaintiff attempting to board the car, then two things must be true: first, the plaintiff was dragged by his left hand from a point about thirty feet south of Adams to the place where he and his partner say

that he was found at Quincy street, or to a point within fifty or sixty feet north thereof, and second, the car must have run from the point where the two girls state they shouted and the conductor gave the signal, to the usual stopping place south of Quincy street.

The record of this case is very long, but we have been at great labor in carefully reading and comparing each and every part thereof, to find if the evidence under the law of this state is sufficient to sustain the verdict. Owing to the position of the girls and the excitement attending the accident and the manifest inaccurate statements of the witness Nagle, and the confused statements, if not brains, of the plaintiff and his partner, and further owing to the volume of testimony, not in all details the same, but unanimously agreeing as to the actions of the plaintiff and his partner, both as to their physical condition, and as to the place and manner of their attempting to board the train when in motion, we find it very difficult to resist the conclusion that plaintiff did not attempt to board the train until after it had left Adams street.

The foregoing review of the evidence has been made to show that there is serious question as to whether the verdict and judgment in this case are not clearly against the weight of the evidence. While it is the province of the jury to pass upon questions of fact and this court reluctantly interferes with the verdict of a jury where there is a conflict in the proof, yet, as the Supreme Court of this state has said, it is the duty of every trial judge to give careful attention to every part of the evidence in a case and to consider it with as much care as if the case were tried by the court without a jury; so the duty of this court is other than merely to record a judgment because based upon the verdict of a jury.

The sufficiency of the evidence to support the verdict is always a proper subject for the consideration of this court, and if it finds the evidence is not sufficient to authorize the judgment, it is the duty of the court to reverse on that ground. Gall v. Beckstein, 173 Ill. 187. A performance

of this duty is absolutely essential for the preservation of rights, where the judgments of this court are final and conclusive upon all questions of fact. Chicago & Erie R. R. Co. v. Meech, 163 Ill. 305.

To induce this court not to consider the evidence, counsel for appellee have cited the North Chicago Street Railroad Company v. Fitzgibbons, 79 Ill. App. 634, where it is said "there was a decided conflict in the evidence." An investigation of that case will show that it had been once before submitted to a jury, and with the like result, of a judgment entered upon the first verdict. The first judgment was reversed in this court, because the verdict was held to be against the weight of the evidence, and upon second appeal this court allowed the judgment rendered at the second trial to stand.

In view of the state of the proof in the case at bar, the jury should have been accurately instructed as to the law. West Chicago Street R. R. Co. v. Dougherty, 170 Ill. 379; Schlesinger v. Rogers, 80 Ill. App. 420. But where the evidence upon which a recovery is asked is slight or doubtful, the jury should be fully and correctly instructed on all questions of law. Swift & Co. v. Rutkowski, 167 Ill. 156.

The court refused to give the following instruction asked by defendant:

"The jury are instructed that the issues in this case should be determined by them as in any ordinary suit, where an ordinary plaintiff sues an ordinary defendant to recover money, giving the verdict to the plaintiff only if the evidence preponderates in favor of the plaintiff's contention, and, unless it does so preponderate, you should as readily give the verdict for the defendant; and determining where the preponderance lies, while it does not consist solely in the greater number of witnesses, the jury are instructed that the greater number of reputable, creditable witnesses on the one side or the other of any material point is proper matter to be considered in determining the question of preponderance; and you may also consider the position of the witnesses at the time of the accident, the point of view from which they witnessed it, and everything which appeals to your judgment as affecting the value and reliability of their testimony."

It is suggested that, inasmuch as the jury were instructed at the request of appellee "that the preponderance of evidence in the case is not alone determined by the number of witnesses testifying to a particular fact or state of facts," etc., the foregoing instruction was unnecessary; but in our opinion, under the circumstances of this case, this last instruction did not fully take the place of the refused instruction. While by a careful process of reasoning the refused instruction might be in part evolved, yet it is very doubtful whether, in this case, it was done by the jury. The refused instruction contained a correct principle of law applicable to the controversy which was not included in any instruction given. Some minor criticisms of the instruction have been made, but we think, as peculiarly applicable to this case, it should have been given.

The court refused the following instruction:

"The jury are instructed that if, under the instructions of the court, they find from the evidence in this case that the plaintiff is not entitled to recover, then they will not have occasion to at all consider the question of damages."

It is not a fit preparation for the jury, dispassionately to consider the question of liability, to proceed first with the discussion of the probable and serious consequences of the injury, and then with sympathies aroused and unavoidably expressed, to return to a consideration of the question of liability. It is conducive to the best results and is proper caution for the court to advise the jury in the language of this refused instruction. Its refusal would not alone work a reversal in this case, but it ought to have been given. We have considered the following refused instruction:

"If the evidence in the case is evenly balanced as between the contention of the plaintiff and that of the defendant, on the material issues, the jury should find the defendant not guilty."

The court instructed the jury in another place what were the material issues, but it must be conceded that the instruction was negative and therefore may not have with sufficient clearness told the jury as a matter of law what were the material issues in the case. However, after con-

sidering the narrowness of the issue in this case, and that under the pleadings and the evidence and the instructions as given, the jury could not have been mistaken as to what the material issues were, we are of opinion that this instruction should have been given. Experience with juries convinces us that unless a jury is specially instructed what to do in case they find that the evidence is evenly balanced as between the contention of the parties, they do not know the law, and if they return a verdict at all in such case, it is liable to be dictated by passion or sympathy.

Complaint is made of certain remarks of appellee's counsel. It appears a juror, when being examined by appellant's counsel, stated that he had had an unsatisfactory experience with a railroad company and made some severe strictures upon the methods adopted by that company in defending a lawsuit, and further stated that he thought that the defendant company in this case, before accepting him, ought to know of his experience. This unfortunate episode was not brought out through the fault of attorney for defendant company, but counsel for appellee, in his closing argument, took advantage of the situation by making the following remarks, in his closing address to the jury:

"I know it hurts you, Mr. Hynes; you don't want sympathy on one side, but you want it on the other. Nobody has mentioned sympathy in this case but the defendant. Anything that has been brought into this case about any prejudice that might exist against railroad companies was brought out by Mr. Hynes himself in the examination of jurors. I am not to blame for that; if anything has been exposed on the examination of jurors before he accepted them as jurors, I am not to blame for it. If any methods have been spoken of—

Mr. Hynes: Exception to that.

The Court: Note the exception; I did not catch it.

Mr. Hynes: I will save the exception."

Appellant's attorney did everything that was necessary to preserve an exception to this most improper language. The court did not hear these words, otherwise he would certainly so have expressed his disapproval, as in part to have corrected the wrong. There was nothing said upon exam-

ination of jurors to warrant in a final speech to the jury a reference to exposure of methods of the defense, and the only effect of such reference by counsel for appellee tended to impute to the defendant company the methods which the juror said had been resorted to unfairly by some other railroad company to win a lawsuit.

Counsel further, in commenting upon the testimony of a policeman, one of defendant's witnesses, stated that the courts have held that the testimony of police officers, in cases in which they are prosecuting, ought to be looked upon with suspicion. The officer was not prosecuting in the case at bar, and the law was not properly stated. The learned counsel for appellee was evidently carried away by his zeal, and we are unable to say that the jury were not swept along by these inflammatory and improper remarks, which were calculated to excite in their minds a prejudice against the defense. Hennies v. Vogel, 87 Ill. 242; C. & E. R. R. Co. v. Binkopski, 72 Ill. App. 22.

In an action where the plaintiff seeks to recover thousands of dollars from the defendant, the breath of passion through the zeal or forgetfulness of counsel must not disturb the most solemn and deliberate consideration of the jury entrusted with duties and responsibilities so important.

It is better that a case be retried than to sustain a verdict tainted with any unfairness. It must be said that counsel for appellee, upon objection, desisted from further making these harmful remarks, showing that he was not actuated by wrong intention, but the words had gone forth and in the language of this court "the mischief had been done." Porter v. Day, 44 Ill. App. 257.

The judgment must be reversed and the cause remanded.

105 471
a204s 527

Supreme Lodge Order of Mutual Protection v. Mathilda Meister.

1. INSURANCE—*A Contract of Indemnity.*—The predominant intention of the parties in a contract of insurance is indemnity, and this intention is to be kept in view in putting a construction upon a policy and by-laws.

2. SAME—*Contract to be Liberally Construed.*—A contract of insurance is always to be liberally construed in favor of the insured, so as not to defeat without a plain necessity the claim to indemnity.

3. SAME—*When Formal Proofs of Death Are Unnecessary.*—Formal proofs of death are not necessary where the company has disclaimed all liability and places its refusal to pay on grounds with which the failure to furnish proofs has no connection.

4. SAME—*Where the Subordinate Lodge is the Agent of the Supreme Lodge.*—Where a member is distinctly required to pay an assessment to the financial secretary of his lodge, and there is no other method of payment, the financial secretary of the subordinate lodge must be conceded to be the agent of the supreme lodge to receive and forward such payment.

5. SAME—*Construction of Laws of the Order.*—The construction must be put upon the laws of the order, taken as a whole, which is most favorable to the insured and most protects the beneficiaries under certificates issued by the order.

6. SAME—*Society Having Money in Its Possession Belonging to a Member, and the Power to Apply It, Must Pay Out of Such Money Assessments Due from such Member.*—A society which has money in its possession belonging to a member, and the power to apply it, must pay out of such money, assessments due from such member, to save a forfeiture of the contract; and it is not necessary in such a case that the member shall authorize the society to so appropriate the money. It is against the policy of the law to permit a society to forfeit a contract for non-payment of an assessment when it has in its possession the money of a member to an amount covering the assessment, and has the power to apply the money as a payment.

Assumpsit, on a policy of life insurance. Appeal from the Circuit Court of Cook County; the Hon. ALONZO K. VICKERS, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Affirmed. Opinion filed January 16, 1903.

This was an action of assumpsit brought to recover the amount of an insurance policy issued upon the life of Nicholas Meister.

Nicholas Meister came to his death June 14, 1894, by suicide. The cause of his death is not urged as a defense to the action; that insisted upon as a reason why appellee is not entitled to recover upon the policy is that Meister was not in good standing at the time of his death, because he had failed to pay certain assessments made upon him, and because of such failure had been, in accordance with the policy and by-laws of the lodge, *ipso facto* suspended.

It is conceded that if payment of assessments had not been made, by the fact of non-payment a suspension took place, and no recovery can be had in this action. It is insisted by the defendant that there was a failure to make formal proofs of death, to which the plaintiff replies that such formal proof was waived by the denial of liability by the lodge. The case has been twice tried; from the judgment first obtained by the plaintiff an appeal was taken to this court, the judgment being reversed because of the insufficiency of the declaration. Thereafter an amended declaration was filed, another trial had, from the judgment obtained by the plaintiff in which, the appeal now under consideration was taken.

CRATTY, JARVIS & LATIMER, attorneys for appellant.

GOLDZIER, RODGERS & FROEHLICH, attorneys for appellee.

MR. PRESIDING JUSTICE WATERMAN delivered the opinion of the court.

Upon the trial of the cause it appeared that Nicholas Meister, about a year before his death, was quite ill and financially embarrassed, so much so that he received from the subordinate lodge of which he was a member, sick benefits on one or two occasions, and he was once suspended from membership in the order by reason of his failure to pay assessments. Thereafter the subordinate lodge resolved to, and did, advance to the Supreme Lodge the assessments for non-payment of which he had been suspended, and in accordance with the rules and regulations of the order he was reinstated, and again became in good standing.

Thereafter, in December, 1893, he paid to the financial secretary of the lodge $21.50; as to the exact sum which he was then owing the subordinate lodge there is dispute.

Appellant contends that he was then indebted to the lodge in the sum of $21.50, $17 of the same being for assessments from May, 1893, to December, 1893, inclusive, and the balance, $4.50, as lodge dues owing by him to the subordinate lodge.

Appellee contends that he was then owing the lodge but $15 for assessments by it advanced for him and either $1.50 or $3 for lodge dues. The principal contention in this case is whether Nicholas Meister, in making the payment of $21.50, made it in payment of amounts due for assessments as he then supposed already called by the Supreme Lodge, or whether he made a payment of $21.50, $17 being for assessments already made by the Supreme Lodge and $4.50 for lodge dues. If the $21.50 was paid by Nicholas Meister entirely on account of assessments, he paid into the subordinate lodge enough to have satisfied all assessments against him up to the time of his death. After making the payment of $21.50 in December, 1893, he became satisfied that he had made an over-payment of assessments, and upon being called upon to pay the assessments thereafter made, he and Mrs. Meister informed the financial secretary of the subordinate lodge that he had made an over-payment of $5, and that such secretary had in his hands funds with which to pay the assessment then demanded from him, Nicholas Meister. He did not make any payment after paying the $21.50 in December, 1893.

May 1, 1894, an assessment of $2 was made upon Nicholas Meister, and it was in respect to this assessment that he and Mrs. Meister insisted to the financial secretary of the subordinate lodge that he had in his hands funds with which to pay such assessment.

Appellant contends that even if there was in December, 1893, paid by Nicholas Meister to the financial secretary of his lodge $4.50 for assessments which had not then been called, such payment was one not valid as against the Su-

preme Lodge; that under the constitution and by-laws of the order there can be no advance payment to a subordinate lodge; or in other words, there can be no deposit made with the financial secretary of a subordinate lodge for the purpose of payment by him to the Supreme Lodge of assessments that may thereafter be called. An instruction to this effect was asked which the court refused to give. We do not agree with the contention of appellant in this regard. In an organization of this kind, in which the failure to pay an assessment of itself suspended a member, and that although he had not actually received notice of such assessment, we see no reason why, as a matter of prudence, one by his business or his health required to be absent for some time from his home, or any member, might not make with the financial secretary of his lodge a deposit to be used in payment of assessments thereafter called.

We find in the constitution and by-laws of this order no provision forbidding such deposit or prepayment. In reference to all organizations of this kind, as well as all contracts of insurance, it is to be borne in mind that the predominant intention of the parties in a contract of insurance is indemnity, and this intention is to be kept in view in putting a construction upon policy and by-laws. A contract of insurance is always to be liberally construed in favor of the assured, so as not to defeat without a plain necessity the claim to indemnity. 1 Phillips on Insurance, Section 124; Healey v. Mut. Accident Ass'n, 133 Ill. 556; Terwilliger v. Masonic Accident Ass'n, 197 Ill. 9; Healey v. Mutual Accident Ass'n, 133 Ill. 556–561.

Nor do we think formal proofs of death were necessary, appellant having disclaimed all liability and placing its refusal to pay on grounds with which the failure to furnish proofs of death had no connection. Bacon on Benefit Societies, Sec. 436, 413; Covenant Mutual Benefit Ass'n v. Spies, 114 Ill. 463–468.

If the $4.50 or a greater sum paid by Nicholas Meister in December, 1893, in excess of assessments then due from him was paid by him on account of lodge dues which he was

then owing, he could not thereafter require such sum to be paid out by the subordinate to the Supreme Lodge in satisfaction of assessments thereafter called.

The ultimate question of fact submitted to the jury in this regard was, did he pay such excess, having the intention expressed or to be presumed from his conduct and the circumstances of the transaction, in satisfaction of lodge dues, or did he pay such sum mistakenly believing that the entire $21.50 was required for the payment of assessments he was then owing; if the latter, the lodge could not appropriate money by him paid for one purpose to another, and if so, that is, if he paid the entire $21.50 for assessments, then whatever overplus was paid by him remained in the hands of the financial secretary of his lodge, to be used, if he so demanded, in payment of assessments thereafter called. That when asked to pay the assessment of May, 1894, he did insist that the financial secretary had in his hands money belonging to him which should be used in payment of such assessment, there was evidence strongly tending to show.

We do not think that counsel for appellee upon the trial in the court below admitted that $4.50 or any other sum was in December, 1893, paid by Nicholas Meister on account of lodge dues, or that the lodge book so shows. There is, as appellant contends, marked distinction between payments made on account of assessments and payments made for lodge dues, and we do not desire to be understood as holding that surplus funds in the hands of the financial secretary of the subordinate lodge paid in for lodge dues can be used by the subordinate lodge in satisfaction of assessments, without the request of the member, although there are authorities that this must be done.

In the present case, that Nicholas Meister did contend that he had money in the hands of the financial secretary paid in for assessments, and did authorize the secretary to apply the same in satisfaction of assessments, there was evidence tending to show. Appellant contends that the subordinate lodge and the Supreme Lodge are different

parties. This to a degree is the case, in other words, the subordinate lodge has no reason for its existence, save for its connection with and dependence upon the Supreme Lodge.

Appellant contends further that neither a subordinate lodge nor any of its officers were or could be, under the constitution and by-laws of the order, agents of the Supreme Lodge, and in this connection calls our attention to section 156 of the by-laws. It being as follows:

"Section 156. Subordinate lodges, and the officers thereof, in all matters pertaining to the making out of applications for membership, the admission of members, the collection and transmission of assessment moneys, or the transaction of any business in connection with the Widows' and Orphans' Protection Fund, are and shall be the agents of the members and not of the Supreme Lodge, and they shall have no authority whatever to disregard any of the laws of the order governing any department of W. O. P. fund.

"Nor shall the Supreme Lodge be liable for the negligence of subordinate lodges or their officers or any of them in any of these matters relating to the admission of members and the W. O. P. fund, nor shall the Supreme Lodge be bound by any irregular or illegal acts on the part of a subordinate lodge or its officers or any of them."

Section 149 of the laws of the Supreme Lodge provides that each beneficiary member of the order to whom a benefit certificate has been issued "shall pay to the Widows' and Orphans' Protection Fund, so often as required by the supreme secretary's notice, assessments according to his age, as determined by the table."

Section 155 provides that each member shall pay into the hands of the financial secretary, that is, the financial secretary of his subordinate lodge, the full amount of his assessment, "or failing to do so shall stand suspended from all rights and privileges in the order without any further act or proceeding on the part of any lodge or officer of the order."

Our attention has not been called to and we are told that there is not in the constitution, by-laws, rules or reg-

ulations of the order any provision by which a member can pay his assessment directly to the Supreme Lodge or any of the officers thereof. A member is distinctly required to pay such assessment to the financial secretary of his lodge; under such requirement, with the plain provision providing the penalty of suspension in case he fails to so pay, and the failure to provide any other method of payment, we think the financial secretary of a subordinate lodge must be conceded to be the agent of the Supreme Lodge to receive and forward such payments. Sections 155 and 156 of the laws of the order appear to be somewhat inconsistent.

We are of the opinion that under well settled rules, the construction must be put upon the laws of the order, taken as a whole, which is most favorable to the assured and most protects the beneficiaries under certificates issued by the order. Appellant asked to have the jury instructed that if a part of the $21.50 paid by Nicholas Meister was for assessments advanced by the subordinate lodge, then the subordinate lodge would have the right to retain out of said sum the amount paid to it on account of such advance. It was unnecessary to give such instruction. The statement contained in it was not disputed upon the trial and is not here. The contention there and here is as to the effect of the amount paid in excess of assessments advanced by the subordinate lodge.

Appellant also asked to have the jury instructed that if Nicholas Meister was, when he paid the $21.50, indebted to the lodge for assessments advanced, and that such indebtedness with the amount of assessments in arrears, together with the dues then paid by Meister, amounted to $21.50, then the jury should find that there was no over-payment by Meister when he paid said $21.50. The instructions assumed a vital question in dispute, viz., whether Meister did then pay lodge dues.

Appellant also asked that the jury should be instructed that if Nicholas Meister, after he was reinstated, paid more to the subordinate lodge than was due it, such fact alone would not relieve him from paying the May assessment call. It was not contended in the trial court, nor is it here, that

if Nicholas Meister, when he paid the $21.50, paid only one cent or one dollar more than was due the subordinate lodge, such payment either then constituted a payment of the May call, or then or thereafter was a payment of the two dollars assessment called in May, 1894.

Counsel for appellant say this instruction was offered on the theory that an over-payment by mistake by Meister of an indebtedness to the subordinate lodge, could not be applied except by his express direction, to the payment of assessments. Appellee does not contend that it could, but appellee did and does contend that Nicholas Meister did expressly direct that the over-payment he claimed to have made should be applied in payment of the May assessment. The court refused to give the following instruction asked by appellant:

"The court instructs you that although you may believe from the evidence that Nicholas Meister in his lifetime during the year 1893 paid the financial secretary as dues a greater sum than was due the lodge, that would not entitle him to have such over-payments credited on the assessment No. 168 and 169, called for the month of May, 1894."

It was not in the court below, nor is it here, contended by appellant that the payment of $21.50 was made entirely "as dues." There was then due the lodge from Nicholas Meister from fifteen to seventeen dollars, which it had advanced for him in payment of assessments; for such advances he was then indebted to it, and in common parlance such indebtedness might be properly spoken of as dues. He was also indebted to it either $1.50 or $3 for that known as lodge dues, being sums accruing at intervals from the mere fact of membership. He could not then have paid the lodge as dues a greater sum than was due to it, except by mistake, or as an advance to be applied for his use in the future.

If he made, in 1893, such over-payment to the lodge that in May, 1894, the lodge was owing him a sufficient sum to pay the May assessment, he had a right to insist that the lodge should apply to the extent of such over-payment the credit he had with it to the satisfaction of such assessment.

The twelfth instruction asked by appellant was in accordance with its theory that a member can not make a prepayment of assessments so as to bind the Supreme Lodge; nor make a deposit with the financial secretary of his lodge to be used in payment of assessments that may thereafter be called; concerning which theory we have already expressed our opinion.

Appellant complains of the introduction of certain affidavits to which it objects. Among other things, a circular approved by the supreme and subordinate lodge, in which it was stated that appellee, Mathilda Meister, would receive nothing on account of the insurance policy carried by her husband. We think this was properly admitted, as showing the attitude taken by appellant; and thus an excuse for the failure to make formal proofs of death. We think the court properly refused to admit evidence showing that Nicholas Meister endeavored to borrow money with which to pay the May assessment. Having no receipt specifically for the May assessment, and payment of it not being conceded by the financial secretary of his lodge, that he should have thought it best to obtain and pay so small a sum as two dollars, rather than to have a dispute, was immaterial.

In Niblack on Benefit Societies, Section 271, it is said:

"It has been held that a society which has money in its possession belonging to a member, and the power to apply it, must pay out of such money an assessment due from the member to save a forfeiture of the contract; and it is not necessary in such a case that the member shall authorize the society to so appropriate the money. It is against the policy of the law to permit a society to forfeit a contract for non-payment of an assessment when it has in its possession the money of a member to an amount covering the assessment, and has the power to apply the money as a payment."

To the same effect is Girard Life Insurance Company v. Mutual Life Insurance Company, 97 Pa. St. 15; see also, Covenant Mutual Benefit Association v. Baldwin, 49 Ill. App. 203.

We do not regard the case of Hansen v. Supreme Lodge, 140 Ill. 301, or any of the other Illinois cases to which our

attention has been called by appellant, as inconsistent with the conclusion at which we have arrived in this case.

After the verdict had been rendered, appellant filed several affidavits setting forth the conduct of appellee and her daughter in the presence of the jury during the closing argument on her behalf. As set forth in these affidavits, the scene was one which ought not to have been permitted and very likely would not have been had counsel for appellant then and there objected thereto and asked the court to take action in regard to it. This they failed to do and we can not set aside this judgment and overturn the verdict of the jury, because of something concerning which the court was not called to take action, and of which, so far as appears, the trial judge, absorbed as he must have been in the consideration of the great number of instructions asked by appellant, was perhaps entirely oblivious.

Appellant did in two instances, during the closing argument of counsel for appellee, object to that being said. One of these objections was directly sustained by the court and the other in effect was.

As has been said, this cause is now here for the second time. The judgment of this court upon the former appeal was, as appears by the opinion in 78 Ill. App. 649, placed upon the insufficiency of the declaration. So far as appears, substantially the documentary evidence presented to this court upon the former appeal is like that now under consideration. If this court had been, upon the previous hearing, of the opinion that there was no evidence warranting the jury in finding that the assessment of May, 1894, had been paid, this court would probably have so said.

We feel that we ought not to reverse the action of the court below as to anything presented in the present record which was before this court upon the former appeal and to which this court then gave attentive consideration, arriving at the final conclusion manifested by its judgment. We find in the record here presented no error warranting a reversal of the judgment of the Circuit Court. It is therefore affirmed.

Willard N. Penoyer v. The People of the State of Illinois.

1. WORDS AND PHRASES—*The Gist of the Action.*—"The gist of the action" has been defined to mean the cause for which an action will lie; the ground or foundation of a suit, without which it would not be maintainable; the essential ground or object of a suit, and without which there is not a cause of action.

2. SAME—*Meaning of "Malice" as Used in Chap. 72, Sec. 2, R. S.*—The term "malice" as used in Chap. 72, Sec. 2, R. S., implies a wrong inflicted on another with an evil intent or purpose.

3. ACTIONS—*Nature of Cause of Action is Shown by Declaration.*—In order to ascertain the nature or cause of an action so as to determine whether it is a tort, it is necessary to look to the allegations of the declaration, rather than to the form of action adopted by the pleader.

Assumpsit.—Appeal from the County Court of Cook County; the Hon. ORRIN N. CARTER, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Affirmed. Opinion filed January 16, 1903.

Appellant was sued in the Circuit Court by one George B. Adams, who filed his affidavit pursuant to Chap. 16, Rev. Stat., setting forth the nature or cause of the action, and alleged facts tending to show that appellant fraudulently incurred the obligation respecting which the suit was brought, and that affiant verily believed the benefit of whatever judgment he might obtain, would be in danger of being lost unless appellant should be held to bail. A *capias ad respondendum* issued, and appellant was held to bail. Subsequently a declaration was filed setting up substantially the same facts stated in the affidavit for *capias*.

Appellant, after demurrer, pleaded to the declaration. The case was heard before a jury which found the issues for the plaintiff and specially found appellant guilty of fraud as charged in the declaration. Judgment was rendered on the verdict and a *capias ad satisfaciendum* issued pursuant to Sec. 5, Chap. 77, R. S. Appellant was arrested and subsequently petitioned for discharge under the Insolv-

ent Debtor's Act (R. S., Chap. 72). Upon hearing he was remanded to custody and appeals from that order.

WILLIAM T. MCMILLAN and HUBERT D. CROCKER, attorneys for appellant.

CRATTY, JARVIS & LATIMER, attorneys for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

The statute known as the Insolvent Debtor's Act provides: "Where any person is arrested or imprisoned upon any process issued for the purpose of holding such person to bail upon any indebtedness, or in any civil action when malice is not the gist of the action, or when any debtor is surrendered or committed to custody by his bail in any such action, or is arrested or imprisoned upon execution in any such action, such person may be released from such arrest or imprisonment upon complying with the provisions of this act." R. S., Chap. 72, Sec. 2.

Upon application made in the County Court by appellant for discharge, the record of the cause in the Circuit Court which resulted in his imprisonment under a writ of *capias ad satisfaciendum*, was introduced in evidence, and the County Court held that the pleading in that cause did not show that malice was the gist of the action. Thereupon, under section 5 of the act last referred to, the question whether petitioner was guilty of the fraud charged, was a second time submitted to a jury. That jury found appellant guilty and he was remanded to custody.

If malice was the gist of the civil action in the Circuit Court which resulted in his imprisonment, appellant was not entitled to release from such imprisonment under the statute. The People v. Greer, 43 Ill. 213. We are unable to concur in the view of the County Court that malice is not shown by the record of the Circuit Court introduced in evidence to have been "the gist of the action." In First National Bank of Flora v. Burkett, 101 Ill., p. 391, this phrase has been defined to mean, "the cause for which an action will lie; the ground or foundation of a suit, without

which it would not be maintainable; the essential ground or object of a suit, and without which there is not a cause of action." The term "malice" is also there defined, and it is said that in some cases it "implies a wrong inflicted on another with an evil intent or purpose, and this is the sense in which it is employed in this statute," referring to the section we are considering. See also, Kitson v. Farwell, 132 Ill. 327-338. In order to ascertain the nature or cause of an action so as to determine whether it was a tort committed by appellant, we must look to the allegations of the declaration, "rather than to the form of action adopted by the pleader." The People v. Healy, 128 Ill. 9-14. The statute (R. S., Ch. 16, Sec. 1) mentions "actions on verbal contracts or assumpsits at law" among those enumerated in which a *capias ad respondendum* may issue. Where the affidavit upon which such *capias* was issued is introduced, such evidence is, we think, also competent for consideration to ascertain the nature of the action. Extrinsic evidence may be considered. Sawyer v. Nelson, 160 Ill. 629-631. A judgment upon which *capias* issued was rendered in an action of assumpsit recovered under a declaration containing only the common counts, in The People v. Hoffman, 97 Ill. 234-235.

The suit in the Circuit Court in the case at bar was assumpsit, and the declaration sets forth at length the cause of action, as does the affidavit upon which the *capias ad respondendum* issued at the commencement of the action. It is not denied by appellant's attorneys that the facts as alleged in the declaration show an "intentional perpetration of an injury or wrong" on the plaintiff in that action; that the declaration sets forth conduct on the part of appellant, which, if proven, would constitute such wrong and intention to commit an injury as would suffice "to deprive the party of the right to a discharge from arrest or imprisonment" (First Nat. Bank v. Burkett, *supra*); but it is said that "the gist of the action of assumpsit is no other than a promise, express or implied," and hence it is argued malice can not be the gist of the action; that by suing

in assumpsit, the plaintiff waived any tort appellant may have committed and was precluded thereafter from treating appellant as a wrong-doer. No doubt a party may waive a tort and elect to accept the wrong-doer as a contract debtor (Birdsell Mfg. Co. v. Oglevee, 187 Ill. 149–151); but it is equally clear that in the case before us the plaintiff did not do anything of the kind. As is said in Barney v. Chapman, 21 Fed. Rep. 903, where the question here presented is considered, "While the action is in form *ex contractu*, the gravamen and gist of the action is a tort clearly set out by the averments in the declaration;" and it is said "the right of action arises from the tort stated and not from the promise averred." It is said in Nevin v. Pullman Palace Car Co., 106 Ill. 222–236, where it was contended the plaintiff had misconceived his form of action, that "assumpsit is a concurrent remedy with case, in all cases where there is an express or implied contract." It may be that an action on the case founded in tort would be a more proper form of action, but assumpsit upon the promise implied by law is maintainable and is not unusual. Chitty on Pleadings, Vol. 1, star page 135. In the case before us the promise is implied from the fraud stated in the declaration, and the malice—*malus animus*—not merely the promise which the law implies therefrom, is the gist of the action.

It appearing, therefore, that malice was the gist of the action in the Circuit Court, which resulted in appellant's being held under the *ca. sa.*, he was not entitled to the benefit of the Insolvent Debtor's Act, and it was error to again submit to a jury the question whether he was guilty of such fraud as he was charged with, and of which he had been found guilty in the Circuit Court. That question was not open to review in the County Court. It was *res adjudicata*. "The former judgment when introduced in evidence was conclusive as to every matter directly and properly at issue in that suit." Kitsen v. Farwell, *supra*.

But the proceedings in the County Court which resulted in a second verdict of guilty, and in remanding appellant again to the custody of the sheriff, did no harm. They

may be regarded as merely superfluous. Appellant can not complain, since the result is the same as if he had been remanded without a second hearing before a jury. The remanding order itself was correct, and it is not made erroneous because it followed upon a wrong conclusion or procedure by the County Court.

The judgment will therefore be affirmed.

James Collier v. Mrs. W. L. Grey.

1. STATUTES—*Sec. 18, Ch. 110, R. S.*—The object of Sec. 18, Ch. 110, R. S., which provides that unless the declaration is filed ten days before the term of court at which the summons is made returnable, the defendant may have a continuance, "and if no declaration shall be filed ten days before the second term of the court, the defendant shall be entitled to a judgment, as in case of a non-suit," is to hasten proceedings and not to allow a plaintiff to keep a defendant attending on court from term to term, without apprising him of the nature of the complaint against him.

2. APPELLATE COURT PRACTICE—*Pleas in Abatement.*—Rule 17 provides that "in all cases in this court where the defendant in error or appellee desires to plead and not join in error, he shall file his plea in the office of the clerk at least five days before the cause stands for trial."

Trespass on the Case.—Error to the Superior Court of Cook County; the Hon. AXEL CHYTRAUS, Judge presiding. Heard in this court at the March term, 1902. Reversed and remanded. Opinion filed December 11, 1902. Rehearing denied and modified opinion filed January 26, 1903.

Plaintiff in error filed a præcipe in an action on the case against the defendant in error November 20, 1900. A summons was issued the same day, but was never served. March 1, 1901, the defendant, by her attorney, entered a special appearance in this cause for the sole purpose of moving the court to dismiss the suit for failure of the plaintiff to file his declaration, as by statute required. Such motion was made on the same day, and the suit was dismissed for the reason aforesaid, and a judgment for costs was entered against the plaintiff, without notice to or

knowledge of the plaintiff. A new summons was afterward taken out, which was served upon the defendant July 26, 1901. A declaration was filed herein August 8, 1901. This writ of error is brought to set aside such order of dismissal, and judgment thereon. April 22, 1902, defendant filed a plea in abatement to the writ of error.

W. S. JOHNSON, attorney for plaintiff in error.

MCCORDIC & SHERIFF, attorneys for defendant in error.

MR. PRESIDING JUSTICE BALL delivered the opinion of the court.

Sec. 18, Ch. 110, R. S., "Practice" provides, in effect, that unless the declaration is filed ten days defore the term of court at which the summons is made returnable, the defendant may have a continuance; "and if no declaration shall be filed ten days before the second term of the court, the defendant shall be entitled to a judgment, as in case of a non-suit." When the motion to dismiss this suit was allowed the defendant had not been served, nor had her appearance been entered except specially for the sole purpose of making the motion to dismiss the suit.

The defendant, in making the motion to dismiss the suit, did not interpret the statute correctly.

"The object of the statute is to hasten proceedings and not to allow a plaintiff to keep a defendant attending on court from term to term, without apprising him of the nature of the complaint against him. If this be the object of the law, and this will not be doubted, then beyond all question the process which is referred to is the one which is served on the defendant." Herring v. Quimby, 31 Ill. 153, 156.

It will thus be seen that for nearly forty years this has been the settled rule of construction. Wilkins v. English, 60 Ill. App. 345; S. C. on appeal, 163 Ill. 542; Emig v. Medley, 69 Ill. App. 199; Chicago City Ry. Co. v. Roach, 180 Ill. 174.

The defendant in error did not file her plea in abatement in apt time, and therefore we can not consider it. Rule 17

provides: "In all cases in this court where the defendant in error or appellee desires to plead and not join in error, he shall file his plea in the office of the clerk at least five days before the cause stands for trial," etc. The briefs of defendant in error, under Rule 23, were due April 17, 1902. When that day had come and gone the case stood for trial. The plea in abatement was not filed until April 22, 1902. Because of the limitation of time contained in Rule 17, the right to file such a plea did not then exist.

The judgment of the Superior Court is reversed and the cause is remanded.

Eugene S. Ellsworth v. Clark Varnum.

1. PRACTICE—*Where There is No Verdict as a Basis for a Judgment.*—Where an order shows that only eleven of the jury were present in court when the proceedings evidenced by the order took place, that no announcement was made by any of the jury, that the paper purporting to be a verdict was not even read in the presence of the jury, but that, by the direction of the court, the matter contained in the paper was entered by the clerk as the verdict of the jury, in legal contemplation there was no verdict, and consequently no basis for the judgment.

Assumpsit, for attorney fees. Appeal from the Superior Court of Cook County; the Hon. ROBERT B. SHIRLEY, Judge presiding. Heard in this court at the March term, 1902. Reversed and remanded. Opinion filed January 26, 1903.

GEORGE R. MITCHELL, attorney for appellant.

WILLIAM C. SCHAEFER, attorney for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a judgment in favor of appellee and against appellant for the sum of $400. Appellant's counsel contends, among other things, that the verdict relied on by appellee is contrary to the manifest weight of the evidence, and that, in legal contemplation, there is no ver-

dict sufficient to sustain the judgment. The facts are substantially as follows:

In November, 1893, a case was about to be commenced in the United States Circuit Court in Florida to test the constitutionality of a tax law of that state, in respect to which appellee addressed to appellant the following letter:

"November 10, 1893.

E. S. ELLSWORTH, 520 Chamber of Commerce, City.

DEAR SIR: You have asked me to give you an estimate of what my fees would be to assist in the case about to be commenced in Florida in the United States Circuit Court, which is to form a test case under the new tax law adopted by the last Florida legislature. I understand that this test case is one that is expected to settle the question of whether this law is applicable to the lands held by yourself and some of the other people in the East, and amounting in all to a considerable holding of lands. I am also advised that it is expected that your local attorney, A. F. Odlin, of Florida, will prepare the case locallyand attend to the making draft of pleadings and of an agreed statement of the facts that can be settled uponand agreed to. Having given the matter some little consideration and considering the gravity and importance of the questions involved, the power and right of the state legislature to pass such unusual and extraordinary laws being one of the principal questions in the case, and considering also that you will likely want the case tried in a way which shall obtain the fullest presentation, I realize that there will be a large volume of work connected with the superintending of and assisting in the preparation of the pleadings, the agreed statement of facts and brief and argument. I also appreciate that there should not, in a case like this, be any mistake made, and that every step be scrutinized and every precaution taken to prevent an adverse and, consequently, disastrous decision.

Considering all these matters I beg to say I think my fees for the preparation of the papers, argument and brief, etc., as above suggested, should be $500, and in the event I should be asked to go to New Orleans to present the matter in the Circuit Court of Appeals, this fee should be increased by about $250, making $750 in all. I beg to assure you that this amount is indeed very modest considering the gravity and importance of the questions involved.

Very truly yours,

CLARK VARNUM."

Appellee testified that about five days after the date of the letter, appellant told him his proposition was accepted. Subsequently, a suit was commenced in the said Circuit Court, entitled Vail v. Richards. Appellant was not a party to the suit, nor did he own any land involved in it, but he owned land in Florida, and, for that reason, was interested in the questions involved in the suit. The persons interested in the suit were Ramsey and others residing somewhere in the eastern part of the United States. That appellee performed services in the suit is not controverted. The controverted question of fact is whether appellant became liable for the whole amount due to appellee for his services in the suit, or for only half thereof. Appellant and appellee were the only witnesses, each testifying for himself. Although inclined to the opinion, after reading the evidence, that the alleged verdict is not supported by the greater weight of the evidence, yet, inasmuch as the cause must be remanded for another trial, for the error hereinafter mentioned, we omit a discussion of that question.

The following order was entered in the cause December 10, 1901:

"This day again come the parties hereto by their attorneys respectively, and eleven of the jury impaneled herein as aforesaid came also, but the twelfth juror, Charles E. Peck, came not, and the sealed verdict signed by all the jurors being returned to the court, wherein the issue was found for the plaintiff and his damages fixed at four hundred dollars, the court directed the clerk to enter the ver dict finding the issues for the plaintiff and assessing the plaintiff's damages at the sum of four hundred dollars. Whereupon the defendant submits herein his motion for a new trial in said cause."

The cause was submitted to the jury December 9th, when the court directed the jury that when they agreed on a verdict they should sign and seal it and deliver it to the bailiff, and that they should all be present, in court, on the next morning, December 10th.

The order of December 10th, *supra*, shows that only eleven of the jury were present in court December 10th, when the proceedings evidenced by the order took place;

that no announcement was made by any of the jury; that the paper purporting to be a verdict was not even read in the presence of the jury; but that, by the direction of the court, the matter contained in the paper was entered by the clerk as the verdict of the jury. In legal contemplation there was no verdict, and consequently no basis for the judgment. Rigg v. Cook, 4 Gilm. 336; Martin v. Morelock, 32 Ill. 485; Griffin v. Larned, 111 Ill. 432; S. L. V., etc., R. R. Co. v. Faitz, 19 Ill. App. 85; Catholic Order of Foresters v. Fitz, 81 Ill. App. 389; 3 Graham and Waterman on New Trials, p. 1408.

The doctrine announced in the authorities cited is, that a direction to the jury to sign and seal their verdict and separate, does not dispense with their personal presence in court when the verdict is opened, because then any juror may dissent, in which case there would be no verdict; and also because the party against whom the verdict is, has the right to an opportunity to poll the jury.

The judgment will be reversed and the cause remanded.

---

105 490
a208s 282

Cyrus Mark, Clayton Mark and Anson Mark, copartners doing business under the name of Mark Manufacturing Company, v. Schumann Piano Company.

1. STATUTES—*Par. 53, p. 1116, Hurd's Stat. 1901, Applies Only to Money Demands.*—Par. 53, Hurd's Stat. 1901, p. 1116, applies only to money demands of a plaintiff against which money demands may be set off, and to cases in which the jurisdiction of the justices may be measured by the statutory limitation of $200.

2. FORCIBLE DETAINER—*Defendant Can Not Set Up Any Cross-Demand.*—A defendant in forcible detainer can not set up any cross-demand of any kind to the action, nor does the statutory limit of jurisdiction apply to actions of forcible detainer before justices. It is immaterial to the jurisdiction how valuable the land may be, possession to which is claimed, or how high the rent. The justice has jurisdiction by virtue of the statute, without regard to the value of the fee or the rental value.

3. ELECTION—*Inconsistent Remedies Must be Co-existent.*—It is essential to the application of the doctrine of election, that the incon-

sistent remedies must have been co-existent. Both remedies must have existed at the time of resort to one of them.

Forcible Detainer.—Appeal from the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge presiding. Heard in this court at the March term, 1902. Reversed and judgment entered in this court. Opinion filed January 26, 1903.

Statement.—Appellee admits that the following statement made by appellants' counsel is substantially correct:

"This is an action in forcible detainer brought by appellants to recover possession of the first, fourth and fifth floors of the building numbered 123 and 125 La Salle avenue, leased by appellants to appellee for the manufacture of pianos, from July 1, 1900, to April 30, 1902, at $250 per month, payable in advance on the first day of each month.

"The lease was dated June 14, 1900, and demised said premises, 'together with motive power not to exceed twenty horse-power, and sufficient heat in the varnishing and finishing room during cold weather to prevent checking the varnish (and steam heat, when necessary, from October 1st to May 1st), for fifty-nine hours per week, Sundays and legal holidays excepted, during the term of this lease.' The lease contained the following clauses:

"'Eighth. To pay (in addition to the rents above specified), for all power used in excess of the amount above specified the sum of $5 per month for each horse-power, the amount used to be determined by lessor by any of the ordinary methods. The maximum amount of power used at any one time to be the basis of calculation.

"'Ninth. At the termination of this lease, by lapse of time or otherwise, to yield up immediate possession to lessor, and failing so to do to pay treble the rate of rent herein specified and all damages, of every nature, for the whole time such possession is withheld, but the provisions of this clause shall not be held as a waiver by said lessor of any rights herein set forth or rights at law; nor shall receipt of said rent or damages, or any part thereof, or any other act in apparent affirmance of the tenancy, operate as a waiver of the right to forfeit and terminate this lease and expel the lessee from the premises for any breach of the covenants herein.

"'It is further agreed by the parties hereto, that after the service of any notice, or the commencement of a suit, or any proceeding of law, or after final judgment for posses-

sion of said premises, the lessor may receive and collect any rent due, and the payment of said rent shall not waive or affect said notice, said suit or said judgment.'

"March 5, 1901, appellants sent appellee a bill for power used by it in excess of twenty horse-power, and the latter denied liability therefor, and set up a counter-claim for damages to its pianos through lack of heat in the finishing room.

"July 17, 1901, appellee sent appellants a bill for its damages and credited thereon the rent due for the month of July, and on the 19th of the same month appellants replied, denying liability for any part of said bill.

"July 20, 1901, appellants commenced a suit in assumpsit against appellee for $5,000, and on September 6, 1901, filed a declaration therein, which contained special counts on the lease in question for moneys due for excess power used, for damages sustained through increase in the rate of insurance on the building, and for the rent due July first. It also contained special counts on two other leases between the same parties for rent July 1, 1901, one for the basement and the other for the second floor of the same building.

"July 24, 1901, appellants served two five days' notices on appellee, under the statute, one for failure to pay the July rent under the lease in question and one for failure to pay the July rent for the basement. Appellee having failed to pay the rent within the five days, this suit was commenced July 30th, before John K. Prindiville, a justice of the peace. At the same time appellants commenced a similar suit against appellee in the same court to recover possession of the basement. Judgment was rendered in favor of appellants in both cases on August 23, 1901. This case was appealed by appellee to the Circuit Court, where it was tried by the court without the intervention of a jury. The court found the defendant not guilty, and appellants bring the case to this court by appeal."

DANIEL F. FLANNERY, attorney for appellants.

A. D. GASH, attorney for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

Appellee's counsel relies solely on two contentions to defeat the action of the plaintiffs, appellants here: First, that the two suits in forcible detainer commenced before Justice Prindiville July 30, 1901, should have been consoli-

dated; and, second, that the commencement by appellants of a suit July 20, 1901, for the rent due July 1, 1901, was a waiver of all right of forfeiture for non-payment of the July rent, and a bar to the present suit; that the remedy by suit for the rent is inconsistent with the subsequent forcible detainer suit, and the plaintiffs having elected to pursue the former remedy, were precluded from, and could not thereafter, maintain the present suit. The statutory provision on which appellee relies in support of the first contention, is as follows:

"In all actions which shall be commenced before a justice of the peace, each party shall bring forward all of his demands against the other existing at the time of the commencement of the action, which are of such a nature as to be consolidated, and which do not exceed two hundred dollars when consolidated into one action or defense, and on refusing or neglecting to do so, shall be forever barred from suing therefor." Hurd's Stat. 1901, p. 1116, parag. 53.

The jurisdiction of justices of the peace is limited by the statute to two hundred dollars. Ib., p. 1110, parag. 16. Paragraph 53, quoted *supra*, clearly applies only to money demands of a plaintiff against which money demands may be set off, and to cases in which the jurisdiction of the justice may he measured by the statutory limitation of two hundred dollars. A defendant in forcible detainer can not set up any cross-demand of any kind to the action, nor does the statutory limit of jurisdiction apply to actions of forcible detainer before justices. It is immaterial to the jurisdiction how valuable the land may be, possession of which is claimed, or how high the rent. The justice has jurisdiction by virtue of the statute, without regard to the value of the fee or the rental value. Appellee's second contention, that appellants, having instituted suit for the rent payable July 1st, can not maintain the present suit, we can not concur in. Suppose that July 20, 1901, when the suit for rent was brought, appellants had demanded the July rent from appellee; would this have precluded a notice to quit and a subsequent suit in forcible detainer for non-payment of the rent? Clearly not. Yet the suit, while pending and

undetermined, is a mere legal demand for the rent. True, it is a demand to which appellee must respond, either by payment or defense, total or partial; but this does not affect its character as a demand. Here there was no act of the appellants subsequent to the notice to quit which can be claimed as a waiver. There was no demand for rent accruing due subsequently to the forfeiture. The only demand was by the suit of July 20th for the July rent, which accrued due July 1st, before the forfeiture.

Taylor, in his work on Landlord and Tenant, Vol. 2, Section 485, writes:

"But the notice may be waived; for after the landlord has given notice, and the time has expired, he may do some act which amounts to a waiver of it, and recognizes a new or subsisting tenancy; as, if he makes a new demise, or receives rent of such, which has accrued due after the expiration of the notice, or after that time distrains for rent whenever accrued, his notice will be considered as having been thereby waived, and the tenancy re-established. But it seems that a pending action for use and occupation will not invalidate the notice, for the landlord may only recover in his action rent due at the time of the expiration of the notice, although he may claim rent to a later period."

See also, 1 Woodfall's Landlord and Tenant, 1 Am. Ed., p. 323. The latter author writes:

"But the subsequent receipt of rent due prior to the forfeiture is no waiver." Ib.

Whatever the effect of the present action on the prior suit for rent, if any, may be, we are of opinion that such prior suit was not a waiver of appellants' right to declare a forfeiture for non-payment of the July rent.

Appellee's counsel relies on the doctrine of election between inconsistent remedies, and contends that appellants, having commenced suit July 20, 1901, for the July rent, can not maintain the present suit. But it is essential to the application of that doctrine that the inconsistent remedies must have been co-existent, as otherwise there could have been no election, no choice between remedies. Both remedies must have existed at the time of resort to one of them. When appellants commenced suit for the July rent

the remedy by suit for forcible detainer did not exist. It was a condition precedent to that remedy that a five days' notice to quit should have been given, as provided by the statute, and such notice had not been given at the time the suit for rent was brought, nor was it given till July 24, 1901. Until the expiration of that notice, namely, July 29, 1901, the remedy by suit for forcible detainer did not exist. Therefore, the doctrine of election between inconsistent remedies has no application to the facts of the case.

Appellants introduced evidence making a *prima facie* case entitling them to a recovery of the premises described in the complaint. This is not controverted, and appellee's sole contentions to defeat a recovery being, as we hold, untenable, the judgment will be reversed and judgment will be entered here, finding the appellee guilty, in manner and form as stated in the complaint, and that the appellants, Cyrus Mark, Clayton Mark and Anson Mark, recover from the Schumann Piano Company, appellee, the premises described in the complaint, to wit: the first, fourth and fifth floors of the building known as numbers one hundred and twenty-three (123) and one hundred and twenty-five (125) LaSalle avenue, in the city of Chicago, county of Cook and State of Illinois, and that the said appellants have execution for the possession thereof; appellee to pay the costs of this court and of the Circuit Court.

Jennie Hernreich, Adm'x, v. Tiodolf Lidberg et al.

1. SPECIFIC PERFORMANCE—*Relief is Within the Discretion of the Court.*—Relief, by way of specific performance, is a matter within the discretion of the court, and will not be granted unless the party seeking it acts as promptly as the nature of the case will permit.

2. SAME—*Of an Agreement to Organize a Corporation.*—Equity will not decree the specific performance of an agreement to organize a corporation when three of the four proposed incorporators are insolvent.

3. SAME—*Equity Will Enforce Contract in All Its Parts.*—Equity, when it takes jurisdiction to enforce the specific performance of a con-

tract, will enforce it in all its parts, and will not undertake such enforcement where the contract calls for a succession of acts whose performance can not be consummated by one transaction, and which requires protracted supervision.

4. GENERAL INCORPORATION ACT — *Intention is that Subscribers to Capital Stock Should Be Persons of Financial Responsibility.*—The clear intention of the incorporation act of this state is that subscribers to the capital stock of a corporation should be persons of financial responsibility, and a court of equity should be slow to exercise its discretion in enforcing specifically an agreement to incorporate which provides that three-fourths of its capital stock should be subscribed by persons who are insolvent.

Bill for Specific Performance.—Appeal from the Superior Court of Cook County; the Hon. AXEL CHYTRAUS, Judge presiding. Heard in this court at the March term, 1902. Affirmed. Opinion filed January 26, 1903.

J. G. GROSSBERG, attorney for appellant.

DANIEL W. SCANLAN, attorney for appellees; WILLIAM E. CLOYES, of counsel.

MR. JUSTICE WINDES delivered the opinion of the court.

November 26, 1900, appellant filed his bill against appellees, by which he sought a decree of specific performance of an agreement therein set out to incorporate the Continental Electric Telephone Company and to compel the appellees Lidberg, Stitch and Davenport, to assign to said company all their right, title and interest in certain letters patent therein described, also for an accounting of appellant's share of the receipts and profits derived by the defendants from selling telephone transmitters under said letters patent. Demurrers to the bill were sustained, and it was subsequently amended and a demurrer to the bill as amended sustained. The bill was further amended and a supplemental bill filed, and a demurrer to the original bill as amended, and to the supplemental bill was sustained, and the bill dismissed for want of equity, from which order of dismissal this appeal was taken.

It appears, in substance, from the allegations of the bill as finally amended, the supplemental bill and exhibits made a part of the bill, among other things not necessary to be

here stated, that about August 21, 1899, appellant made an agreement in writing with the appellees Lidberg, Stitch and Davenport, to form a corporation to be known as the Continental Electric Telephone Company; that on the opening of books of subscription they should each receive 1,250 shares, being all of the stock of the corporation, each share being of the par value of $10; that each of the parties should be elected a director for one year, and be re-elected such directors for the first five years of the existence of the corporation; that the officers of the corporation the first five years of its existence should be Stitch, Lidberg, Davenport and Coyne, and that said parties as stockholders should vote for by-laws and resolutions as might be necessary to carry into effect the provisions of the agreement; also that said Lidberg, Stitch and Davenport jointly were the owners of certain rights under letters patent of the United States, issued to Lidberg and Davenport, all three of whom, in consideration of the agreement to incorporate, agreed and promised to assign and transfer all their right and interest in said letters patent to the proposed corporation on its organization, and that in pursuance of said agreement Coyne, Lidberg and Stitch procured a license to be issued to them, authorizing them to open books of subscription for the capital stock of the said proposed corporation, and that in consideration of the agreement to incorporate, and of an agreement to issue 1,250 shares of capital stock of the proposed corporation to him, Coyne agreed to advance and pay for carrying on the business of and for necessary expenses of incorporating the proposed corporation, not to exceed $1,000; that Coyne advanced from time to time for said purposes different sums specified in the bill, in all exceeding the sum of $1,000, but that Lidberg, Stitch and Davenport from time to time delayed the assignment of their several interests in the letters patent, and finally refused to make any assignment thereof, and refused to complete the organization of the proposed corporation; that on October 16, 1899, said Lidberg and others of the defendants, for the purpose of defrauding Coyne,

caused a license to be issued to incorporate another corporation, the Swedish-American Telephone Company, completed the organization thereof, and on November 1, 1899, Lidberg, Davenport and other defendants, naming them, proceeded to do the business theretofore conducted under the name of the Continental Telephone Company at its former place of business, but under the name of said Swedish-American Telephone Company, and by the business so conducted said defendants are receiving large amounts in profits, and that the business is a large, growing and profitable one; that before the organization of the last named corporation, Coyne notified each of the defendants of his, Coyne's, rights and claims under said agreement to incorporate and to assign said letters patent, as above stated, and that each of the defendants, in proceeding with the business, would do so at his peril; but notwithstanding, they wholly disregarded the notice, and proceeded with the business of the Swedish-American Telephone Company, as above stated; also, the bill shows that said Lidberg, Stitch and Davenport are wholly insolvent. There is no allegation in the bill which shows any excuse for appellant's delay in filing the bill from November 1, 1899, when he knew that Lidberg, Stitch and Davenport refused to carry out their agreement to incorporate and to assign said letters patent, until November 26, 1900, when the bill was filed.

A sufficient justification for the dismissal of appellant's bill is the fact of his delay for more than a year after he knew of the refusal to carry out the agreement to incorporate and to assign the letters patent, in filing his bill. Relief, by way of specific performance, as is well settled, is a matter within the discretion of the court, and will not be granted unless the party seeking it acts as promptly as the nature of the case will permit. When there is a long delay, as in this case, unexplained by equitable circumstances, the relief will not be granted. 1 Story on Eq. Juris., Sec. 771; Pomeroy on Contracts, Sec. 403; Anderson v. Frye, 18 Ill. 94; Colby v. Gadsden, 34 Beav. 418; McDermid v. McGregor, 21 Minn. 111.

In the section from Pomeroy on Contracts, cited *supra*,

the author states the rule as to delay in seeking specific performance as follows: "A party seeking the remedy of specific performance, as the actor, must show himself, in the language of many judges, to have been ready, desirous, prompt and eager," and cites numerous cases in which the doctrine has been applied. To like effect is the citation from Mr. Story.

In the Anderson case, *supra*, it is said that if "one applies for relief after a long lapse of time, unexplained by equitable circumstances, his bill will be dismissed," citing numerous cases. The delay in that case was two and one-half years in making application to enforce a contract for the sale of land.

All the authorities also agree that when there has been a change in the circumstances, so that it would be inequitable to enforce specific performance, delay will always bar it, and it is not of controlling importance that there should be a very long delay.

In the Colby case, *supra*, it was held that a delay of seven months, where both the parties were insisting upon the contract being carried out, would not be a bar to relief, but the court quotes with approval the rule that where one party has said that he would have nothing more to do with the contract, the other, desiring its execution, must file his bill speedily.

In the McDermid case, *supra*, a case where one party to the contract had given notice that he would not perform it, a delay of one year was held to be a bar, and the court quotes with approval the following language from Eastman v. Plumer, 46 N. H. 464, viz:

"Those who desire to secure the aid of equity in enforcing the performance of contracts must show themselves prompt, ready and eager to perform them and abide by them."

But upon the merits of the bill we are of opinion that the demurrer was properly sustained, for at least two reasons, viz: First, that equity will not decree the specific performance of an agreement to organize a corporation when three of the four proposed incorporators, as is the case here,

are insolvent; and, second, equity, when it takes jurisdiction to enforce the specific performance of a contract, will enforce it in all its parts, and will not undertake such enforcement where the contract calls for a succession of acts whose performance can not be consummated by one transaction, and which requires protracted supervision. R. R. Co. v. Echternacht, 21 Pa. St. 220; Sheffield, etc., Co. v. Harrison, 17 Beav. 294; Stocker v. Wedderburn, 3 Kay & J. 393, 406; Hetfield v. Willey, 105 Ill. 286; Sub. Con. Co. v. Naugle, 70 Ill. App. 391, and cases cited; Truitt v. Clark, 81 Ill. App. 652.

In the Hetfield case, *supra*, which was a bill for specific performance, it was held that when a contract is "enforced at all, it must be done as the parties made it," and that the court had no rightful authority to enforce it otherwise, and that this rule was announced by numerous cases in the Supreme Court. The court also say, "The rule is a familiar one that applications for the specific performance of a contract are within the sound legal discretion of the court hearing the cause," and that discretion is always controlled by the equitable circumstances of the case and not by the mere caprice of the chancellor.

In the Railroad case cited, *supra*, the Pennsylvania Supreme Court affirmed a decree of the trial court which dismissed a bill seeking to enforce the specific performance of an agreement by the defendant to subscribe certain shares of the capital stock of the railroad company, not then incorporated, and held that if the agreement was a valid contract, the remedy was at law and not in equity.

In the Naugle case, *supra*, which was very fully and carefully considered, it was held that an agreement to construct and equip a railroad and operate it for two years, could not be specifically enforced in equity. The court, speaking through Mr. Justice Sears, say:

"Courts will not undertake to enforce specific performance of contracts, extending over considerable time and including a series of acts essential to a complete performance."

The language is fully supported by numerous cases cited

and reviewed in the opinion, and, as we think, states a principle clearly and directly applicable to the contract here in question, in so far as it provides for the election and re-election of the parties to it as directors and officers of the proposed corporation.

In the Stacker case, *supra*, the High Court of Chancery in England refused to specifically enforce a contract to incorporate a joint stock company and to sell certain letters patent to the company when it should be incorporated. The contract, among other things, provided that the shareholders should be considered directors and the affairs of the company should be governed by them. The court held, among other things, that the entire agreement must be enforced, if at all; that the court could not compel directors to act, and therefore could not enforce that part of the contract.

The clear intention of the incorporation act of this state, as indicated by its provisions, is that subscribers to the capital stock of a corporation should be persons of financial responsibility, and we think a court of equity should be slow to exercise its discretion in enforcing specifically an agreement to incorporate which provides, as the one here in question does, that three-fourths of its capital stock should be subscribed by persons who are insolvent. This contract also provides, as we have seen, that each of the subscribers of stock should be elected a director for one year and re-elected as such director for the first five years of the existence of the corporation, and that each of them should be officers of the corporation for the first five years of its existence. Under the authorities cited the court would not undertake to enforce a part of the agreement only, but would enforce it in all its parts. To enforce these last provisions would require a continuous supervision of the corporation for at least five years. Such an undertaking is, to say the least, impracticable, and is something a court of chancery will not do.

In view of these conclusions it seems unnecessary to discuss other points made and argued by counsel.

The decree of the Superior Court is therefore affirmed.

Sarah Dexter Noe v. John H. Witbeck.

1. WRITTEN INSTRUMENTS—*Construction, Where There is an Obvious Mistake Made on the Face of the Instrument.*—A court of law may, when there is an obvious mistake made on the face of the instrument, which is corrected by other expressions therein, construe it according to the evident intent of the parties, as manifested by all the language used.

Bill to Foreclose a Trust Deed.—Appeal from the Superior Court of Cook County; the Hon. AXEL CHYTRAUS, Judge presiding. Heard in this court at the March term, 1902. Affirmed. Opinion filed January 26, 1903.

Statement.—This is an appeal from a decree foreclosing a trust deed on a bill filed by appellee July 13, 1901, against John A. and Maggie A. Doherty and appellant.

The Dohertys executed to Witbeck, November 1, 1897, their two promissory notes, payable to their own order and by them indorsed, one for the sum of $6,000, due five years after date, and the other for the sum of $1,500, due two years after date, both notes bearing interest at the rate of six per cent per annum before maturity, and on default of payment of the interest at maturity, the interest to be seven per cent after maturity. The interest was payable semi-annually and was evidenced by interest notes. Payment of the $1,500 note was extended by indorsement thereon, as follows: "The within $1,500 principal note is hereby extended as follows: $500 to be paid on or before May 1, 1901, and the remaining $1,000 to be paid on or before November 1, 1901." "Three interest coupons of $45 each, due, one May 1, 1900, one November 1, 1900, and one interest coupon for $30, due November 1, 1901, are to be given for the semi-annual six per cent interest to accrue during such extension." Notes for the semi-annual interest were given accordingly. The trust deed contains a provision that "if the time for the payment of the principal sum aforesaid shall be extended, the provisions of said note and this trust deed shall continue in force until the sums hereby secured are fully paid."

Issues having been made upon the bill, the cause was referred to a master to take proofs and report his conclusions. Pending the reference to the master, the court made the following order:

"This cause having come on to be heard, upon motion of the complainant to appoint a receiver of the property named in the bill in this cause, and upon the bill of complaint herein, and it appearing to the court that there should be a receiver to take charge of the buildings and the property for the benefit of the complainant herein, and said cause having been argued by the counsel for the respective parties, now, therefore, in consideration thereof it is ordered, adjudged and decreed and the court doth hereby order, adjudge and decree, that Homer G. Howard be appointed receiver of the grounds and building described in the bill of complaint herein," etc.

The master's report is, in substance, as follows:

That notes and trust deed were executed and delivered to complainant by the Dohertys as stated in bill of complaint.

That said deed of trust contains, among other provisions, the following:

"And it is further covenanted and agreed that in case of default for a period of ten days in making payment of any of said notes, either principal or interest, or of a breach of any covenant or agreements herein by the party of the first part, or the heirs, executors, administrators or assigns of the said first party, then the whole of said principal sum hereby secured shall at once (without notice thereof to said party of the first part, or the heirs, assigns or legal representatives of said party), at the option of the holder of any one of said notes then unpaid, become due and payable. And the said party of the first part hereby appoints any attorney of any court of record to be the true and lawful attorney of said party of the first part, to appear in any court of record in which any bill may be filed for the foreclosure of this deed, and waive service of process, and file an answer therein confessing all material facts in said bill set forth, and waiving proof thereof, and confessing to be due the amount claimed therein for principal and interest, and advances and expenses under this deed, and consenting to the immediate entry of a decree therefor, and of a decree for strict foreclosure if the same be prayed

in such bill, directing a sale forthwith of said premises, and all right, title and equity of redemption of the party of the first part, the heirs and assigns of said party, therein, in accordance with law and the practice of such court, for the purpose of paying the amount of such decree, interest and costs, and to such other provisions, orders and findings as are usually embraced in such decrees, and consenting that said party of the second part or either of his successors in trust may be appointed a special commissioner to make the sale provided for in said decree, who shall receive as his commission upon such sale an amount equal to that allowed by law to sheriffs upon sales upon execution, and such compensation as receiver as the court may direct. And out of the proceeds of such sale shall be paid:

"First. All the costs of such suit, including attorney's and trustee's fees. And it is agreed the sum allowed and decreed for complainant's solicitor's fee shall be five per cent of the amount of the principal note hereby secured, and in no event less than one hundred dollars.

"Second. All the moneys advanced by the party of the second part, or his successor in trust, or any one of the holders of said notes for taxes, assessments, insurance, abstracts of title, repairs, mechanic's liens, or for any other purpose authorized in this deed, with seven per cent interest on such advances.

"Third. All the accrued interest remaining unpaid on any of said notes.

"Fourth. All of said principal money remaining unpaid; and the overplus of the purchase money, if any there be, shall then be paid to the said Maggie A. Doherty and John A. Doherty, or their heirs, successors or assigns, on reasonable request."

"That all of the notes except those shown as exhibits filed with the complaint were paid and discharged.

"That at the date of the filing of the bill of complaint herein, complainant was and still is the legal holder and owner of said notes filed as exhibits with the bill of complaint.

"That default was made in the payment of the note maturing May 1, 1901, and that said default continues to this day.

"That on August 16, 1901, the said complainant advanced the sum of $4.25 as and for a continuation of the abstract of title to said premises.

"Finds that the Dohertys conveyed premises to defend-

ant Noe by warranty deed, which deed was recorded in the Recorder's office of Cook county, Illinois, and

"Such warranty deed contained the following:

"'This conveyance is made subject to a trust deed to Will H. Moore, trustee, dated November 1, 1897, made by grantors herein to secure two principal notes executed by said grantors, and payable to their own order and by them indorsed, one for $6,000, payable five years after its date, and one for $1,500 payable two years after its date, both bearing interest at six per cent per annum, evidenced by interest notes; said $1,500 note having been extended by the legal holder thereof as follows: $500 to May 1, 1901, and $1,000 to November 1, 1901. Also subject to taxes for the year 1900, all which the party of the second part herein assumes and agrees to pay.

"Finds that defendant Noe is the owner of equity of redemption, and is personally liable to complainant for the indebtedness secured by the last mentioned trust deed.

"Said master further finds that there is due, owing and payable to complainant, John H. Witbeck, from defendants, Maggie A. Doherty and John A. Doherty, and from defendant Sarah Dexter Noe, and from each of them, on account of the provisions of said notes and said deed of trust, and on account of the foregoing, the sum of $7,964.62, as appears from the following items:

Principal promissory note 'B' due by election..	$1,500 00
Seven per cent interest on $500 from May 1, 1901, to November 1, 1901.....	17 50
Six per cent interest on $1,000 from May 1, 1901, to November 1, 1901.....	30 00
Extension of interest note No. 3, due May 1, 1901	45 00
Seven per cent interest from May 1, 1901, to November 1, 1901.....	1 57
Principal promissory note 'A' due by election..	6,000 00
Six per cent interest thereon from May 1, 1901, to November 1, 1901.....	180 00
Interest note No. 'A' due May 1, 1901.....	180 00
Seven per cent interest thereon from May 1, 1901, to November 1, 1901.....	6 30
August 16, 1901, cash advanced for abstract of title.....	4 25
Total.....	$7,964 62

"Also the further sum of $375 incurred to be paid herein as and for complainant's solicitors' fees, which sum

last mentioned is five per cent of the amount of the principal notes secured by said trust deed and expressly provided by said deed of trust, and is a usual, reasonable and customary fee for the services rendered in and about this cause by the solicitors for the complainant.

"That said complainant, John H. Witbeck, has a valid lien on said premises for the amounts above found due him.

"Said master therefore recommends that the usual and regular decree of foreclosure and sale be entered herein in accordance with this report.

"All of which is respectfully submitted this 1st day of November, 1901."

Objections were filed by appellant to the master's report, which were ordered to stand as exceptions on the hearing. The court overruled the exceptions, confirmed the report and decreed in accordance therewith. It was provided in the decree that, in the event of a deficiency, on sale of the premises, the complainant should have a deficiency decree against appellant and the Dohertys.

F. W. COOMBS, attorney for appellant; R. W. ROBINSON, of counsel.

MILLARD & ABBEY, attorneys for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

Appellant's counsel objects that there is no averment in the bill that appellant accepted the deed of the premises in question from the Dohertys, or any evidence that she took possession of the premises, as averred in the bill, or that appellee was the legal owner or holder of the notes at the time of their maturity, or that appellee ever elected to declare any unmatured principal sum due; that there is no evidence to sustain an item of $4.25 included in the amount found due by the master; that the amount allowed as solicitors' fees is excessive and unwarranted, and that the court erred in appointing a receiver.

It is averred in the bill that the Dohertys "executed and delivered to one Sarah Dexter Noe" their warranty deed of the premises described in the trust deed. This is a sufficient averment. A delivery necessarily imports a recip-

ient. Appellant does not deny the delivery to her, or that she accepted; but impliedly admits acceptance of the deed. She avers in her answer that she is the owner of the premises, but denies liability "by reason of the execution or delivery to her of any deed by the said John A. Doherty, or the said Maggie A. Doherty."

On the hearing before the master the following occurred:

Q. "Have you got the deed with you, Mr. Coombs, the deed from Maggie A. Doherty and John A. Doherty to Sarah Dexter Noe, conveying the real estate described in the bill?"

Mr. Coombs: "No, sir, I have not."

Q. "Mrs. Noe has the deed, or you have it for her?"

Mr. Coombs: "My impression is that it has been returned from the recorder's office. It is either in her possession, or it has not been returned from the recorder's office."

Mr. Coombs, appellant's solicitor, then said he had no objection to the putting in evidence a certified copy of the deed. Whether or not appellant went into actual possession of the premises, is immaterial. The notes were produced and put in evidence by appellee, and William H. Moore testified that the Dohertys executed the notes, and that they were delivered by him, the witness, to appellee. The filing the bill was a sufficient election by appellee to declare the unmatured paper due. As to the item of $4.25 contained in the master's report as follows, "August 16, 1901, cash advanced for abstract of title," the evidence is that appellant's solicitors advanced that sum, on behalf of the complainant, toward paying for an abstract of title. It is, however, sufficient to say that in the objections to the master's report, which were made exceptions on the hearing, there is no specific objection to the $4.25 item, or any objection sufficient to call the master's attention to it. The provision of the trust deed in respect to solicitors' fees is as follows:

"And it is agreed the sum allowed and decreed for complainant's solicitors' fees shall be five per cent of the amount of the principal note hereby secured, and in no event less than one hundred dollars."

The objection of appellant's counsel is that there were two principal notes; that the provision quoted should be applied to the smaller, or $1,500 one, and that the fee should be, at most, $100. But in a prior part of the trust deed the following occurs: "Now, therefore, this indenture further witnesseth, that the said party of the first part, for the better securing the payment of said principal sum of money, with interest thereon, according to the true intent and meaning of the said principal notes and of the said interest notes, and the prompt fulfillment of the covenants on the part of the said first party herein contained," etc.; then follow the words of conveyance. The original trust deed put in evidence before the master, and returned by him to the lower court as an exhibit, has been produced before us. It is a printed form, with only such written words in it as are necessary to make it applicable between the parties to it, and in it the words "principal note," where they occur in the above quotation, are in print, and next after the "e" in the word "note" the letter "s" is written, making the words to read "principal notes." We think it clear that, in the provision for solicitors' fees quoted *supra*, the letter "s" was omitted by mistake or inadvertence after the word "note," and that the parties intended five per cent of the principal notes and not of the "principal note." The parties evidently intended a criterion for the allowance of a solicitor's fee, but the words "principal note" furnish no criterion, because there are two principal notes, and in this patent ambiguity it seems impossible to determine on which of the notes, if either, to estimate the five per cent. The parties evidently intended to state an amount, five per cent of which should be allowed as solicitors' fees. In Siegel, Cooper & Co. v. Colby, 176 Ill. 210, the court say:

"It is well settled that a court of law may, when there is an obvious mistake made on the face of the instrument which is corrected by other expressions therein, when the whole instrument is considered, construe it according to the evident intent of the parties, as manifested by all the language used."

In Packer v. Roberts, 140 Ill. 9, it is said, in connection

with a review of many authorities on this subject, "Inaccuracy of language which results from inserting a word not meant, or using the wrong word, will not be permitted to defeat the intention, when it can be distinctly ascertained." See also, Packer v. Roberts, cited by the court, *supra.*

One witness testified before the master that the usual and customary fee for foreclosing a mortgage is five per cent of the amount due. Another testified that a fair, usual and customary fee would be from $400 to $500.

The trust deed contains the following provision:

"And it is covenanted and agreed by and on behalf of said first party, and on behalf of said first party's heirs, legal representatives, assigns and lessees of said premises, that upon or after the commencement of proceedings in any court to foreclose this deed of trust, as hereinbefore provided, a receiver may be appointed by such court, and continued in office to manage the aforesaid property, collect the rents and profits thereof, and apply the same to the costs, interest and debt hereby secured, as such court may direct, until the sale of said premises under the decree in such proceeding," etc.

This provision clearly authorized the appointment of a receiver. McLester v. Rose, 104 Ill. App. 433, citing, among other cases, Loughridge v. Haugan, 79 Ill. App. 644, and First Nat. Bk. v. Ill. Steel Co., 174 Ill. 140. See, also, Bagley v. Ill. T. & S. Bank, 199 Ill. 76.

The sole objection of counsel to the appointment of the receiver is, that the court, after referring the cause to the master, was powerless to hear and determine the application for a receiver. This is rather a startling proposition, and is not in the least supported by Shack v. McKey, 97 Ill. App. 460, or Cox v. Pierce, 120 Ill. 556, cited by counsel. We think it too plain to require argument that the court, by referring the cause to the master, was not rendered powerless to appoint a receiver, as provided by the trust deed.

The decree will be affirmed.

105 510
m208s 424

Charles H. Smyth et al. v. Horace H. Stoddard.

1. FIXTURES—*Pass by Deed of Land to Party Without Notice of Agreement Between Grantor and Lessee.*—The tenant of land entered into an agreement with the landlord whereby the tenant should either receive a fair consideration for a certain covering and stalling which he had erected upon the land, or should have a reasonable time within which to remove it. The landlord afterward deeded the land to a party who had no notice of the agreement. *Held*, that the covering and stalling passed with the land.

2. PRACTICE—*Where the Master's Finding Has Been Approved by the Chancellor.*—Where the finding of the master who saw the witnesses and heard their testimony has received the sanction of the chancellor, it should not be disturbed unless clearly and palpably wrong.

3. INTEREST—*When Recoverable.*—Where defendants' action is a virtual appropriation of plaintiff's property, they are liable for the value thereof from the date of its appropriation, with interest, the latter being in the nature of damages.

4. LANDLORD AND TENANT—*Trade Fixtures Must Be Removed on or Before the Expiration of the Lease.*—Unless trade fixtures are removed by the tenant on or before the expiration of his lease, they become a part of the realty.

Bill for an Injunction.—Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge presiding. Heard in this court at the March term, 1902. Affirmed. Opinion filed January 26, 1903.

Statement.—One Robert C. Seyd, June 1, 1893, filed a petition against appellee, Stoddard, to restrain the latter from removing a certain covering and stalling which had been built by him upon stone foundations for a barn on a farm near La Grange, Ill., then occupied by Stoddard as a tenant of said Seyd. A temporary injunction was issued according to the prayer of the petition. Stoddard filed an answer, in which he claimed to be owner of said covering and stalling by virtue of an agreement between him and the appellants, dated August 13, 1888, the appellants then being the owners of the farm and Stoddard their tenant under a written lease, and claimed the right to remove the said covering and stalling under said agreement, or that appellants should pay him for the same. Stoddard also filed a cross-bill, making said Seyd and appellants parties,

and asking that the question of ownership of the covering and stalling should be determined, and if found in appellee, then that the injunction be dissolved and he be given a reasonable time to remove the same; and if the ownership should be found in Seyd, then that an accounting be taken of the fair value of the covering and stalling, and that appellants be decreed to pay him therefor, and for general relief. Appellants answered the cross-bill, by which they admit the agreement of August 13, 1888, but claim that Seyd, who purchased from them by deed dated November 24, 1891, knew of their agreement with appellee, and that the latter was not entitled to an accounting against them as claimed by the cross-bill, and in no event were they liable for the stalling and covering at the time it was built, but only at the time of the accounting, if any should be ordered. Appellants also filed a supplemental answer, from which it appears, among other things, that appellee continued to occupy said premises as tenant of Seyd, E. S. Dreyer and a receiver of the premises, respectively, from the year 1893 to February 1, 1899, ever since which last date they have been the owners of the farm; that appellee had wrongfully removed a blacksmith shop and corn-crib from the premises in March, 1899, for which they claimed to be reimbursed, and that appellee was guilty of laches in not asserting his rights under the contract of August 13, 1888, earlier. They also filed a cross-bill, in which they make the same claims as in their answer.

Seyd answered the cross-bill of Stoddard, and issues were made upon the original petition, as well as upon the cross-bill of Stoddard and the cross-bill of appellants. The cause was referred to a master to take proofs and report his conclusions. The master took evidence and made a report, to which objections were interposed by appellee and appellants, which were all overruled and ordered to stand as exceptions before the court. Upon a hearing before the chancellor all exceptions to the master's report were overruled, the report confirmed, and a decree rendered against appellants for $3,270.18 and costs, including

$232 for master's fees and expenses, to review which this appeal is taken.

N. M. JONES, attorney for appellants.

MERRIAM & PHELPS, attorneys for appellee.

MR. JUSTICE WINDES delivered the opinion of the court.

The principal contest in this case arises under the agreement of August 13, 1888, between appellants and appellee, referred to in the statement, which, in substance, provides that appellee should be authorized to erect on the farm then occupied by him as tenant of appellants, a covering and stalling upon and over a stone foundation for a barn then on the farm, at his expense. The agreement then proceeds as follows:

"And we hereby agree that whenever you surrender and deliver up possession of said farm to us, at the expiration or termination of any lease you may hold from us, that we will either pay you a fair consideration for said covering and stalling at such time, or we will give you a reasonable time within which to remove said covering and stalling from said stone foundations and from said premises."

The master found, in substance, as follows: That appellants made a lease of said farm on October 25, 1887, to appellee, running to April 30, 1889, under which the latter occupied the farm; that on the day of its date the above recited agreement was made, pursuant to which appellee erected the covering and stalling in question; that the lease was by verbal and written extensions continued, and appellee occupied said farm as tenant of appellants until April 30, 1893, but, in the meantime, by deed dated November 24, 1891, appellants conveyed the premises to Seyd, which deed was recorded March 8, 1892; that no arrangement was made between appellants and Seyd as to the covering and stalling in question, and it did not appear that the latter had any notice, at the time of his purchase, of appellee's rights under the agreement of August 13, 1888; that about April 5, 1893, appellee served on the agents of Seyd and the agent and attorney of appellants a notice of his claims under the

agreement of August 13, 1888, and asked that he either be paid for the barn (meaning the covering and stalling), or be given a reasonable time in which to remove the same; that June 1, 1893, Seyd filed his bill referred to in the statement, to prevent appellee from removing the said stalling and covering, and states the said respective cross-bills of appellee and appellants referred to in the statement and the subsequent possession of appellee of said premises, in substance as stated in the supplemental answer of appellants to the cross-bill of appellee, and that his possession was terminated in March, 1899; that in 1893, when the lease of appellants to appellee was about to expire, the latter made arrangements to vacate the farm, removed some of his property therefrom, and while so engaged entered into negotiations with Seyd, by which the latter made a lease to appellee of the farm at a reduced rental, under which lease and subsequent extensions he retained possession of the farm until March, 1899; that under a verbal arrangement made in May or June, 1894, with E. S. Dreyer, who was at that time the owner of the farm, appellee was permitted to erect upon the premises a corn-crib and straw-shed, and to place thereon a blacksmith shop, all of which were to be removed from the farm at the expiration of appellee's lease, unless purchased by Dreyer; that on November 1, 1897, appellee took a lease from one Walker, the receiver of said premises appointed in a foreclosure proceeding, which expired January 31, 1899, at which latter date appellants became the owners of the farm through the foreclosure proceeding; that after the expiration of the receiver's lease, appellee, without the consent of the receiver or appellants, removed the corn-crib and blacksmith shop from the premises; that the corn-crib rested upon cedar posts set in the ground about fifteen inches, and that the blacksmith shop rested upon two poles attached to the bottom of either side of the building and could be removed at will without in anywise disturbing the realty.

The master further found that by the deed of appellants to Seyd, the title to the real estate and all its appurtenances

passed to Seyd, the latter having no notice of appellee's rights by virtue of the agreement of August 13, 1888, and that appellee could claim nothing as against Seyd, but that his only right to relief was as against appellants; that appellants, by the sale to Seyd, rendered themselves incapable of performing that part of their agreement with appellee by which he could be permitted to remove the barn at the expiration of their lease to him, and that appellants, by their sale to Seyd, obtained from him the value of the barn, for which they should account to appellee; and that appellee was entitled to the value of the barn (meaning the covering and stalling) as it was on April 30, 1893, with interest at five per cent per annum.

The master then, after discussing at considerable length the conflicting evidence, finds the value of the barn to be $2,394.04, and of the corn-crib $85, and holds that the value of the crib should be credited to appellants, with interest at five per cent per annum, for the reason that the corn-crib was a part of the realty and was wrongfully removed by appellee.

The master further finds that appellee should be charged and appellants credited with $50, the fair rental value of the farm for the month of February, 1899, during which month appellee occupied it after the expiration of his lease from Walker, the receiver, and interest thereon at five per cent from March 1, 1899.

The master states the account between appellee and appellants upon the basis of his said findings, and fixes the amount due from appellants to appellee as $3,253.77, for which he recommends the entry of a decree. The chancellor approved the master's report, and to the amount found by the master added interest at five per cent per annum on $2,394.04, from the date of the master's report to the entry of the decree, making a total of $3,270.18.

For appellants it is claimed that there was error in making the preliminary injunction against the removing of the covering and stalling perpetual, but we are clearly of the opinion that the master and chancellor were right in find-

ing that the title to the covering and stalling in question passed by the deed of appellants to Seyd, and thereby appellants rendered themselves incapable, as against Seyd, of allowing a removal. This was a virtual appropriation of appellee's property by appellants, the value of which, it must be held, they received from Seyd, and the fact that after a lapse of some seven years they again became the owners of the property, does not, in our opinion, change the relative rights of the parties.

It is claimed for appellants that the master and chancellor erred in finding that appellee occupied the premises under leases and extensions of leases made by appellants to appellee until the 30th of April, 1893, but after a careful examination of the evidence we think that finding is justified. It is true that some of the allegations of appellee's pleadings would seem to point to a different conclusion, viz., that appellants' last lease to appellee expired April 30, 1892, but even if this can be said to be the true situation, it would not change the liability of appellants to appellee, as found by the court, for the reason that appellants, by the sale and conveyance of the property to Seyd, rendered it impossible for them to carry out their agreement of August 13, 1888, with appellee, except by paying him the value of the covering and stalling.

Another claim is made that the court erred in finding that appellee offered to surrender the premises to appellants on April 30, 1893, or at any other time, for the reason, as it is claimed, that no notice was served upon appellants to that effect, but only upon one Ward, who was in the office of Mr. Jones, the attorney of appellants, they being non-residents.

We think there is sufficient evidence in the record to show that Mr. Jones was at the time of the service of the notice the agent of appellants, and represented them with regard to this property in a general way, and that the service upon Mr. Ward in his office (Ward accepted service of the notice for Mr. Jones) was a sufficient service upon the latter. No claim is made that Mr. Ward was not Mr.

Jones' representative. It appears from the evidence that Mr. Jones made leases and extensions of leases for appellants to appellee from time to time, before the service of this notice, collected the rents under said leases for appellants, and signed for appellants their agreement with appellee of August 13, 1888.

If, however, Mr. Jones was not such an agent of appellants as that service of notice upon him would be good as to them, that fact should not change the result in this case. As has been stated, the respective rights of appellee and appellants under the agreement of August 13, 1888, became fixed by the sale and conveyance to Seyd.

Counsel for appellants with great earnestness argue that the court erred in finding the value of the covering and stalling to be $2,394.04, and that the finding is excessive and unconscionable; also that the date of April 30, 1893, for fixing that value was wrong, and that, in any event, it should have been in March, 1899.

We have carefully read all the evidence in the light of counsel's argument, and can not say that the finding of the master in that regard is clearly and palpably wrong. One item contained in the estimate of the witnesses, viz., a pump valued at $100, we think should not have been included, since it could not come within the terms of the agreement of August 13, 1888. If, however, this item is wholly excluded from the evidence, the valuations placed upon the covering and stalling alone by appellee's witnesses is larger than the amount allowed therefor. The evidence of value is conflicting, and while we think the amount allowed by the master for the covering and stalling is somewhat large, it is, in our opinion, justified by the evidence. The master saw the witnesses and heard their testimony, and his finding, having received the sanction of the learned chancellor, should not be disturbed unless clearly and palpably wrong. Siegel v. Andrews & Co., 181 Ill. 350–6; Fabrice v. Von der Brelie, 190 Ill. 460–5: Hubbard v. Hubbard, 198 Ill. 621–4; Arnold v. North West. Tel. Co., 199 Ill. 201–4.

The rights of the parties under their agreement having

been fixed by the sale to Seyd, we think there was no error in estimating the value of the covering and stalling as of April 30, 1893. It might well have been fixed a year earlier upon appellants' theory that no lease from them to appellee existed after April 30, 1892.

A further claim is made that the court erred in allowing interest to appellee, but no argument is made in this respect, nor is any authority cited in support of the claim. The action of appellants was a virtual appropriation of appellee's property, and made them liable for the value thereof from the date of its appropriation, with interest, the latter being in the nature of damages. Sturges v. Keith, 57 Ill. 451–462; Bingham v. Spruill, 97 Ill. App. 374–377; 1st Sutherland on Dam. 677.

It is also said that the court erred in allowing and taxing as a part of the costs and expenses of the suit, the sum of $82 stenographer's fees. It appears from the master's report that he had charged $150 for making report and $82 "stenographer's fees for taking testimony." The court allowed the "sum of $232 charged as master's fees and expenses herein." The master, in any event, was entitled to charge for the testimony taken by him at the statutory rate of fifteen cents per one hundred words. There is nothing to show what this amount was. That the master had the testimony taken by a stenographer in the master's presence, would not affect this right. No objection was taken by appellants before the master to his charge, nor was there any exception to the charge before the chancellor, so far as we can find from the record. The master's report showing, as it does, his charges, and no objection or exception thereto having been taken either before the master or the chancellor, it is too late to urge the claim for the first time in this court.

A cross-error by appellee is assigned as to the credit of $85 for the corn-crib and interest, but we are of opinion it should not prevail. Conceding that the corn-crib was built by appellee under an agreement with his landlord, Dreyer, that he might move it off when he ceased to be a tenant,

and that it was of such a nature that it could have been moved without material injury to the realty, still we think the chancellor was correct in charging appellee with its value and interest. From the evidence it appears that the crib was in the nature of a trade fixture, and unless removed by the tenant on or before the expiration of his lease, became a part of the realty. 2 Taylor on Landlord and Ten., Secs. 545, 551, 552, and note 3, p. 148, and cases cited; Sanitary Dist. v. Cook, 169 Ill. 184-190.

This crib was built in 1894, under a lease to appellee then existing. It had expired when, on November 1, 1897, appellee took a lease from Walker, receiver, in which no mention was made of the crib and no reservation of any rights to remove buildings from the premises is contained in the lease. Under the authorities cited, it became a part of the realty and passed to appellants under the foreclosure proceeding. It was removed, as the master finds, without the consent of the receiver or appellants and against the receiver's objection, and its value, with interest, was properly charged to appellee.

What has been said we think fully covers other minor contentions in the case, and the decree of the Superior Court being, in our opinion, correct, is affirmed.

The Supreme Court of the Independent Order of Foresters v. Hanna Erica Mutter.

1. APPELLATE COURT PRACTICE—*Verdict Manifestly Against the Weight of the Evidence.*—A verdict manifestly against the weight of the evidence will be reversed.

Trespass on the Case.—Appeal from the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge presiding. Heard in this court at the March term, 1902. Reversed and remanded. Opinion filed January 26, 1903.

WILLIAM C. SCHAEFER and CLARK VARNUM, attorneys for appellant.

P. E. O'NEIL, MOSES H. BLOCH and GEORGE K. RUDOLF, attorneys for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a judgment for $1,108.34 in favor of appellee and against appellant. October 21, 1897, the appellant issued a benefit certificate to Otto Mutter, appellee's husband, in and by which appellant, in compliance with certain conditions by said Otto Mutter, agreed to pay to his beneficiary, in the event of his death, the sum of $1,000. Appellee was designated as his beneficiary. October 8, 1899, Otto Mutter died. The cause, by agreement of the parties, was tried by the court, without a jury.

Appellant's contentions are: 1. That appellee was bound by the by-laws of the order to exhaust her remedy by appeal within the order before bringing her action. 2. That her action was barred because brought too late, in view of a limitation expressed in appellant's by-laws. 3. That Otto Mutter committed suicide. One of appellant's by-laws provides that, on the death of a beneficiary member of good standing, due proof of claim shall be sent to the supreme secretary, who, on receiving it, shall lay it before the supreme chief ranger. By other by-laws it is provided that contracts for benefits do not include assurance against self-destruction, sane or insane, and that any member who commits suicide within three years of his initiation shall forfeit all benefits, except the one-thirtieth of the amount of the mortuary benefit held by him and remaining unpaid.

The proof of claim in this case was rejected by the supreme chief ranger on the express ground that the deceased committed suicide, and the time of his death being within three years from the time of his initiation, $33.34, being the one-thirtieth of the sum assured, was tendered to appellee and by her refused. By appellant's by-laws appellee might have appealed from the decision of the supreme chief ranger to the executive council and from the executive council to the supreme court of the order. It is

well settled in this state that she was not bound so to do, but that she might, notwithstanding appellant's by-laws, sue at law, the right asserted being a property right—a money demand and not involving merely a question of discipline. People v. Order of Foresters, 162 Ill. 78, 83–4.

Appellant's counsel, in his argument, contends that the force of the decision cited "is nullified by the case of Waldeck Lodge v. Grand Lodge Knights of Pythias, 166 Ill. 71." We do not so understand the latter case. It was a case involving solely a question of discipline, and the court was careful to say: "We do not find that any legal rights are properly involved in this proceeding." Ib. 78.

Sub-section 2 of by-law 213 of appellant is as follows:

"All civil actions or other legal proceedings to be brought or instituted against the supreme court, or against any other court or branch of the supreme court, shall be brought or instituted within six months after notice of the final action of the supreme court in the matter has been served, in accordance with the provisions of sections forty-two, ninety-eight and one hundred and sixty-five of the constitution and laws of the order."

Other by-laws are as follows:

"265. (1) Upon the death of a member in 'good standing' in a court, the court deputy, or the chief ranger, or in their absence, the vice-chief ranger and recording secretary, shall call a special meeting of the court, at which meeting the proof of claim for mortuary benefit of the deceased member shall be presented to the court for investigation; provided, that if the court deputy or other officers of the court refuse or neglect to call such special meeting, the beneficiaries of the deceased member may appeal direct to the supreme chief ranger."

"2. (1) The supreme court shall consist of not less than two hundred nor more than two hundred and ten active or voting members, exclusive of its honorary members."

"(2) The acting or voting members of the supreme court shall be composed of its officers and representatives from the high courts, who are members in 'good standing' in the order."

"264. Sub-section 6: Whenever a claim for mortuary benefit is rejected, notice thereof shall be sent by the

supreme secretary to the court of which the deceased was last a member, and also to the beneficiaries of the member, if their address be known to him."

The evidence shows that Otto Mutter was, at the time of his death, a member in good standing. Therefore, under sub-section 1 of section 265, quoted *supra*, the court deputy or supreme chief ranger, or in the absence of those officers, the vice-chief ranger should have called a special meeting of the court, and the court, when met in pursuance of such call, should have passed on the proof, as provided by sub-section 3 of section 265, and notice of the final action of the court, in case of rejection of the claim, should have been served on appellee by the supreme secretary. None of these things was done. Sub-section 2 of section 213, on which appellant's counsel relies, provides in terms that "actions * * * shall be brought or instituted within six months after notice of the final action of the supreme court." Obviously, when there has been no action of the supreme court, and, necessarily, no such notice, the limitation does not apply.

Sub-section 1 of section 258 of the by-laws is as follows: "Except as provided in sub-sections two and three of this section, the contracts for benefits undertaken by the supreme court do not include assurance against self-destruction or suicide, whether the member be sane or insane."

Sub-section 2 of the same section provides: "Any member of the order who commits suicide shall, *ipso facto*, void all his benefit certificates and, *ipso facto*, all benefits whatsoever," and further provides, in substance, that in case of suicide, the amount provided in sub-section 3 shall be paid. Sub-section 3 provides, in substance, that if a member commits suicide within three years from the date of his last initiation or re-instatement, one-thirtieth of the amount of his mortuary benefit shall be paid to his beneficiaries. The constitution and by-laws of the order are a part of the contract between appellant and the deceased. He expressly agreed to be bound by them. This is not controverted by appellee's counsel, whose sole contention as to the question of suicide is, that the deceased did not com-

mit suicide. Whether he did or not, is a question of fact, depending for solution on the evidence. An inquest was held on the body of Otto Mutter the 9th and 10th days of October, 1899, in Lake county, Illinois, where he resided while living. The verdict of the coroner's jury is as follows:

"We, the undersigned jurors, sworn to inquire of the death of Otto Mutter, on oath, do find that he came to his death by shooting himself with a shotgun."

Then follow the signatures of the jurors.

Edwin J. Whiting testified that about October 8th or 9th, 1899, he started with his wife, little daughter and hired girl through the wood, to go nutting; and about 10:30 or 11 o'clock in the morning he saw Otto Mutter about seventy-five feet distant from him, the witness, sitting with his back against a stump, with his right foot bare; that he casually glanced toward Mutter and walked on; that he didn't see the gun at that time; couldn't see it; that he walked straight west, and when he had walked about half a block he heard a shot behind him from the east; that subsequently, on the same day, witness' brother told him that a man had killed himself, and about six hours after he had heard the shot he walked over to see whether Otto was the man and saw the body. He describes what he saw, substantially thus: The body was lying back against the stump; the upper part of the head was blown off, from the eyes, and was lying directly back on top of the stump; he was facing west, his right foot bare, and his left foot stretched out; some of his brains were on the stump; his hat was blown to pieces and the outside rim of it was hanging on the edge of the stump. The gun was grasped in his right hand, the stock of it on the ground between his feet, the barrel up and down his breast, the muzzle about to his neck; a couple of whisky bottles were about eight or ten feet to the northeast of him, and a pipe was lying by his side. "No one else was round there when I passed, or just before I heard the shot. I looked at the gun and found that the right barrel had been

discharged. The left barrel was loaded and the hammer cocked."

Charles A. Whiting testified that he was at the place where Mutter was found dead, about 4:30 o'clock. His testimony is substantially the same as that of E. J. Whiting, and in addition to testifying that Mutter's right foot was bare, he testified that his stocking and shoe were on his left foot, also that one of the whisky bottles was full and that he should judge a good drink was out of the other.

Andrew Rump testified that about 3:30 o'clock P. M., he was walking on the west side of the Northwestern railway track, and saw the body west of the track. His evidence is corroborative of that of the Whitings, except that he says both of Mutter's feet were bare. He says that the gun was a nice-looking, double-barrel, breech-loading shotgun.

Carl Peterson testified that he knew Otto Mutter for about three months; that they worked at the same place; that Otto drank from one dozen to two dozen bottles of beer daily, and that about the latter part of August he heard Otto complain that his wife was sick, that he could get no sleep at night, and that if she didn't get better he would blow his head off, because there was nothing but doctors.

John Speld, financial secretary of the subordinate lodge to which Otto Mutter belonged, testified that Mutter came to the lodge a meeting or two before his death, and that he acted in a peculiar way, as if he had been drinking, and that witness smelled whisky or drink on his breath; also that Mutter said to him that he was unhappy; that his wife was always sick, and he saw no improvement and was tired of it. John Plantin corroborated Speld as to Mutter's appearance at the lodge.

Anna Ryan testified that she worked in Mutter's house in October, 1899, and that October 8th she saw him cleaning his gun before he left the house.

Appellee testified, in substance, that she and her husband lived happily together; that he often went hunting, and

even when working often took his gun with him; that the morning of October 8th he took his gun with him; that he kissed her good-bye, as he usually did when leaving, and said he would return by seven o'clock, if not sooner; that his credit was good, and he worked steadily, and that she didn't see him come home drunk.

Charles Peterson testified that he saw Mutter's gun at his, Mutter's, house, about three months before his death; that then it appeared to be all right; that in the summer next after his death, he again saw and examined the gun and found it in bad condition; that the hammers were more or less loose; that of the right barrel more so; that "the hammer would stay up all right, and anything touch it of course would go off without touching trigger."

Appellee testified that she got the gun from the coroner and that she took it to Peterson's house just as it came from the coroner.

Charles Whiting, who was a member of the coroner's jury, testified that the gun was examined by that jury; that it was opened by the foreman of the jury and the cartridges taken out; that each member of the jury looked at the gun, and each one pulled the triggers; that the triggers were pretty hard, and had to be pulled before the hammers would go down; that witness tried to push the hammers down without pulling the triggers; that the left barrel was loaded and the other empty, and that the gun was in good condition. The gun was not produced on the trial.

The foregoing was substantially all the evidence bearing on the question of suicide. The finding of the court necessarily included a finding that the deceased did not commit suicide. We think it unnecessary to discuss the evidence or comment on it. Our conclusion, after careful consideration, is that the finding of the court that Otto Mutter did not commit suicide, is manifestly against the weight of the evidence. Therefore the judgment will be reversed and the cause remanded.

105 525
110 *187

Imperial Manufacturing Co. et al. v. Ignatz Schwartz.

1. STATUTES—*Section 220 of the Criminal Code—Corporate Names.*—Section 220 of the Criminal Code does not prohibit the mere assumption of a corporate name, but the putting forth of a sign or advertisement and therein assuming a corporate name for a particular purpose, namely, for the purpose of soliciting business. The mere assumption of a name appropriate for a corporation would be no violation of the statute; nor would the putting forth of a sign or advertisement in which a corporate name is assumed, if not done for the purpose of soliciting business, constitute such violation.

2. TRADEMARKS—*Public Are Entitled to Protection.*—The public are entitled to protection from the use of previously appropriated names or symbols in such manner as may deceive them by indicating or leading to the purchase of one thing for another.

3. SAME—*Right of a Corporation to the Use of its Name.*—The right of a corporation to the use of its name, can be no greater or different in principle than that of an individual; and although an individual may acquire the right to use his name as a trademark, he may be enjoined from doing so, if some other person having the same name, has previously acquired the right to use it as a trademark upon his goods.

Bill for an Injunction.—Appeal from the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge presiding. Heard in the Branch Appellate Court at the March term, 1902. Affirmed. Opinion filed January 16, 1903.

This is an appeal from an interlocutory order granting an injunction.

The bill of complaint sets out that complainant Schwartz has been trading under the name of "Imperial Manufacturing Company, I. Schwartz, proprietor," in Chicago for about four years, and has spent money building up a valuable trade; that one Levin, who is made a party defendant, had been his clerk for several years, learning of his forms of stationery and methods of advertising; that having left appellee's employ, Levin induced the other individual defendants to go into the same line of business, and in order to deceive the public, to adopt a name, style and title identical with that which was being used by complainant; that the new organization, under the name "The Imperial Manufacturing Company," appellant herein, is deceiving

the public and stealing appellee's trade, using similar stationery and complainant's methods of business, causing appellee irreparable injury, etc.

It is stated in the answer that appellant has been incorporated in this state, and it is alleged that appellee, Schwartz, had theretofore been using the name in controversy, pretending to be a corporation, and so imposing upon the public; that until after appellant's incorporation, appellee did not make use in connection with the name "Imperial Manufacturing Company," of the words "I. Schwartz, proprietor." It is further claimed that by reason of an unfulfilled promise of partnership with Schwartz, said Levin was as much entitled to use the name as appellee, and it is denied that appellant is simulating the latter's stationery and business methods.

The Circuit Court found the facts substantially as set up in the bill and issued the injunction complained of, from which this appeal is prosecuted.

SIGMUND S. JONAS, attorney for appellants; ROSENTHAL, KURZ & HIRSCHL, of counsel.

FRIEDMAN & ROGAN, attorneys for appellee; JOHN S. STEVENS, of counsel.

MR. JUSTICE FREEMAN delivered the opinion of the court.

By the injunction order appellants are enjoined from deceiving the public by using the name, "The Imperial Manufacturing Company," in any business similar to that heretofore carried on by said complainant under the trade name of "The Imperial Manufacturing Company," and from simulating, for the purpose of deception, or in any way imitating the advertisements, circulars, letters, or other forms or methods used by said complainant in his said business, "for the purpose upon the part of said defendants to thereby secure or appropriate to themselves the name, business or reputation therein of said complainant," until the further order of court.

It is contended that appellee is without equity because

it is said he has been using the name "Imperial Manufacturing Company," a corporate name, in violation of section 220 of the Criminal Code. That section is as follows: "If any company, association or person puts forth any sign or advertisement, and therein assumes, for the purpose of soliciting business, a corporate name, not being incorporated, or, being incorporated, puts forth any sign or advertisement, assuming any other or different name than that by which it is incorporated or authorized by law to act, such company, association or person shall be fined not less than $10, nor more than $200, and a like sum for each day he or it shall continue to offend after having been once fined."

It has been said of this statute, "What the statute denounces is not merely the assuming of a corporate name, but the putting forth a sign or advertisement, and therein assuming a corporate name for a particular purpose, namely, for the purpose of soliciting business. The mere assumption of a name appropriate for a corporation would be no violation of the statute; nor would the putting forth of a sign or advertisement in which a corporate name is assumed, if not done for the purpose of soliciting business, constitute such violation." Edgerton v. Preston, 15 Ill. App. 23–26.

Without this statute there appears to be nothing necessarily improper, nothing *malum in se*, in the use by private persons in their business, of names of the character of those usually applied to corporations. Such use has been common and has been deemed perfectly legitimate. If such name is used to deceive the public, the deception, the improper use made of the name, not the name itself, constitutes the fraud. In the case before us, it does not appear that appellee was using the name in controversy for any improper purpose. Appellant's only charge is that appellee has been "imposing on the public by pretending to be a corporation," such alleged imposition consisting solely in the fact that he has conducted his business for three years under the name of Imperial Manufacturing Company. What the statute

prohibits is the use of a corporate name "for the purpose of soliciting business." As said in Edgerton v. Preston, *supra*, "The court could not say as a matter of law, that such was the purpose." In Best Brewing Company v. Vinterum, 67 Ill. App. 555, where the appellee was doing business as "United States Show Case Company," it was held that there was no sufficient evidence in the record to warrant the court in holding that appellee had violated the statute by soliciting business under the corporate name. It is not, therefore, enough to show the mere use of the name to make out a violation of the statute; there must be some evidence, at least, tending to show such use as the statute forbids. We are referred by appellant's counsel to the original opinion in Hazelton Boiler Company v. Hazelton Tripod Boiler Company, 30 Northwestern Reporter, 339–344, where it was said, in substance, that the assumption and use of a corporate name by persons not incorporated was in violation of law. But the same case is reported in 142 Ill. 494, and it appears that upon more mature consideration the Supreme Court abandoned the view at first taken and omitted from their final opinion the language above referred to.

It appears, however, that whatever may have been his former method of using the name, when this bill of complaint was filed appellee was trading under the name of "Imperial Manufacturing Company. I. Schwartz, proprietor." This modification clearly obviated the objection urged. No one could well be misled to suppose that a name so used was that of a corporation. When, therefore, this bill was filed, we see no evidence whatever that appellee was not entitled to come into a court of equity and seek the relief, if any, to which he may be entitled.

It is quite apparent here and is not denied, that the individual appellants, learning that the name under which appellee had been doing business was not that of a corporation, concluded that it might be to their advantage, to enable them to take some of appellee's business and injure the latter, with whom one of them at least, Levin, had difficulty,

if they should form a corporation and appropriate appellee's business name. Whether they supposed that by so doing they could exclude appellee from further use of the name and wholly appropriate to themselves the reputation and business he had built up under it, does not definitely appear. But "if they established their new business and sought to conduct it with the fraudulent and wrongful intention of attracting to themselves the custom intended for appellee, this is clearly a fraud upon the rights of the latter." Allegretti v. Chocolate Cream Co., 177 Ill. 129–133.

Furthermore, "the public are entitled to protection from the use of previously appropriated names or symbols in such manner as may deceive them by inducing or leading to the purchase of one thing for another." Matsell v. Flanagan, 2 Abb. Pr. N. S. 459; Hopkins Amusement Company v. Charles Frohman, 103 Ill. App. 613. It is, we think, also true, that the public are entitled to protection from being misled to trade with parties not known to them, under the impression that they are doing business with an established firm or person with whom they have been accustomed to deal. It seems to be conceded by appellant's counsel that "a modified injunction would have been applicable" in this case; but it is said the appellant corporation had the right to use the name in some way. In Boiler Co. v. Tripod Boiler Co., 137 Ill. 231–233, it is said: "The right of a corporation to the use of its name, can be no greater or different in principle than that of an individual; and although an individual may acquire the right to use his name as a trade-mark, he may be enjoined from doing so, if some other person, having the same name, has previously acquired the right to use it as a trade-mark upon his goods." Where, as here, so far as appears from the present record, the corporate name was selected and the corporation organized for the express purpose of diverting, by deception and fraud, the trade and business of appellee, and with the fraudulent and wrongful intention of appropriating by such means the business, good-will and patronage which appellee had built up under the same name, we think it not improper in this case to

restrain its use, as was done, in the business in which appellee has been using the name, and any business of similar character, "for the purpose upon the part of said defendants to thereby secure or appropriate to themselves the name, business or reputation therein of said complainants." As we interpret this order it restrains the use of the name for fraudulent and deceptive purposes. Otherwise the corporation is not restrained by the order complained of, from using its corporate name. We are of opinion that the significance of the order might be more clearly stated and remove any ambiguity. If upon final hearing it should be found that the injunction ought to be made perpetual, this will probably be done. As we understand its meaning, it is not erroneous, and the order of the Circuit Court is therefore affirmed.

Edward E. Sprague v. Monarch Book Company.

1. INJUNCTIONS—*Where Notice Must be Given.*—Notice of an application for injunction must be given unless it is clearly necessary to act without notice.

Bill for an Injunction.—Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANECY, Judge presiding. Heard in the Branch Appellate Court at the March term, 1902. Reversed. Opinion filed January 16, 1903.

This is an appeal from an interloctury order of the Circuit Court of Cook County, granting a temporary injunction without notice.

The bill of complaint, filed by the appellee, alleges that the Monarch Book Company for several years has been and is now engaged in the business of manufacturing, publishing and selling at wholesale, popular subscription books, and that it was incorporated under the laws of the State of Illinois, May 25th, A. D. 1894; that its present place of business is in Chicago, with a branch office in Philadelphia; that its business is carried on by means of agencies established in every state and territory of the United States;

that during the year it employs thousands of local canvassers; that it was the first to use the word Monarch in connection with any firm or company engaged in selling books; that the word Monarch in the book business has an arbitrary meaning, and is not descriptive, but has become exclusively identified with the books and publications of appellee; that it now has a reputation with the people of the United States as a book publishing concern for honesty and fair dealing; that it has expended a very large amount of money in advertising its name as a house publishing and selling books; that it has a paid-up capital and assets of $100,000 and a surplus of $75,000, while the alleged capital of appellant is $10,000, and will consist, as appellee is informed, of the assets of J. H. Moore & Company, an unsuccessful concern; that the name Monarch Book Company appears upon each one of its own publications; that appellant with other persons has conspired to deprive the appellee of the profits that had accrued to it and which would fairly be earned by it by reason of such a large expenditure of money, and with intention of taking advantage of the reputation earned by the Monarch Book Company and of deceiving and misleading the public into believing that the Monarch Book Company had established a wholesale branch of its own business under the title of "Monarch Wholesale Company," and meaning and intending to engage in an unfair and unlawful competition in trade with the Monarch Book Company. Appellants, on or about March 13, 1902, made an application to the Secretary of State of Illinois for incorporation under the laws of the State of Illinois, under the name of "Monarch Wholesale Company;" that the purpose and object of said Monarch Wholesale Company, as stated in their application for incorporation, is to print, bind, publish, buy, sell and advertise books, periodicals, pamphlets and papers, and carry on a general publishing business; that the name of the said proposed corporation has been adopted to mislead the public; that appellee believes that great confusion will arise at the postoffices in the delivery of letters or other mail addressed to the two

companies; that if appellant and his associates are permitted to effect the incorporation of their company, great and irreparable loss and damage will accrue to the Monarch Book Company, which can not be adequately compensated by money damages.

Prayer is for perpetual injunction restraining "defendants" and each of them from completing said proposed incorporation or from using the name "Monarch Wholesale Company" as a firm or copartnership, or from using the name "Monarch" in connection with the publication or sale of books, or holding themselves out as in any way connected with the Monarch Book Company; and that the said "defendants" be likewise restrained in like effect while this cause is proceeding to final decree. Motion for an injunction was heard on the bill and the order for a writ of injunction thereupon was issued.

NEWMAN, NORTHRUP & LEVINSON, attorneys for appellant; AARON HEIMS, of counsel.

FELSENTHAL & FOREMAN, attorneys for appellee.

MR. JUSTICE BURKE delivered the opinion of the court.

In this case the Circuit Court ordered the issuance of a writ for temporary injunction without notice.

Appellant asks that order be reversed on the ground that it was issued without notice to himself or to any of the defendants and that no facts appear in the bill or affidavit which warrant the issuance of an injunction without notice. The statute, section 3, chapter 69, (Injunctions) R. S., is, viz.:

"No court, judge, or master, shall grant an injunction without previous notice of the time and place of the application having been given to the defendants to be affected thereby, or such of them as can conveniently be served, unless it shall appear from the bill or affidavit accompanying the same that the rights of the company will be unduly prejudiced if the injunction is not issued immediately or without such notice."

The affidavit attached to the bill contains no allegation

that the rights of the company will be unduly prejudiced if the injunction is not issued without notice. The bill alleges that (1) the Monarch Book Company has a large capital invested and is widely known as publishers and sellers of books and sends out a large amount of advertisers; that (2) defendants made an application to the Secretary of State of Illinois under the name of "Monarch Wholesale Company;" that (3) the defendants, through the proposed corporation of Monarch Wholesale Company, intend to cover the same territory and handle the same class of publications as handled by the company, and intend to engage in unfair competition in trade and thereby to mislead the public into believing that the Monarch Wholesale Company is but the wholesale department of the company; (4) that thereby confusion will arise at the postoffices in the delivery of mail and that if said defendants are permitted to perfect the corporation, irreparable loss and damage will accrue to the company.

It appears from the bill that the company has offered to repay defendants moneys expended by them in and about procuring license for incorporation, and the company further states in its bill that said defendants have wholly refused and still refuse to desist from completing their proposed incorporation, and will, unless restrained by injunction, perfect such organization and carry out the purposes for which said company is sought to be incorporated. No allegation is found in the bill which states any reason why an injunction should be granted without notice to the defendants. It is not therein stated that they or some of them could not have been conveniently served with notice. It is true that notice will not be required when the mere act of giving notice may be productive of the mischief apprehended. 1 High on Injunctions, Sec. 22. The bill need not contain a statement that the giving of notice would be productive of the injury sought to be avoided, but the allegations of fact must be such that a conclusion fairly may be drawn therefrom that the acts sought to be enjoined will be completed and thereby the rights of the

complainant unduly prejudiced if the injunction prayed for is not issued without notice. To obviate the necessity of giving notice a mere possibility that the giving of notice of the application for injunction might produce or enhance imaginary mischief is not sufficient. The well-settled rule is that notice of the application for injunction must be given unless it is clearly necessary to act without notice. Nusbaum v. Locke, 53 Ill. App. 244; Chicago City Railway Co. v. Montgomery Ward & Co., 7 6Ill. App. 536.

It is insisted that unless jurisdiction had been granted without notice to defendants, that they might have completed their proposed organization before the application for injunction could have been heard by the court; but no statement to that effect is made in the bill, and it does not appear to us, by reading the allegations of the bill as set forth in the abstract of record, there would not have been sufficient time, after the complainant concluded to close his negotiations with the defendants, to have served notice of the intended application to the court upon those defendants who conveniently could have been served. The statutory acts necessary to complete the incorporation in this case would have required sending or writing to Springfield and consequently the lapse of some considerable time. Further, conceding the possibility that the defendants could have completed their proposed organization before an order for an injunction could have been procured, if notice had been given, nevertheless it does not follow that irreparable injury or any injury whatever would have come to the complainant, merely because of the completion of the proposed organization. The bill does not show, nor can it be inferred from any allegations therein, that the mere completion of the proposed organization would have deprived the company of its rights, nor does it appear therefrom that the rights of the defendants would have become greater in consequence of the completion of their proposed organization. If complainant can show that he has the exclusive right to the use of the word "Monarch" in the prosecution of his business, the fact, of itself, that the court is called upon a

few hours earlier or later to protect his rights can work no irreparable loss or damage to him. The injunction order further restrains the defendants from holding themselves out to the public as connected with or as a branch or department of the company. It is self-evident that no irreparable loss could have come to the company in connection with this matter, if notice had been given to the defendants before application for injunction was made. We desire to emphasize by repeating the language used by this court in Chicago City Railway Co. v. Montgomery Ward & Co., *supra*, "The extraordinary remedy of injunction without notice should not be allowed except in extreme cases," and we will add that the injunction writ must not be granted except in cases where the statute is strictly complied with. If a defendant who is financially irresponsible is about to withdraw money from the bank, an injunction without notice may be shown to be necessary. Where the facts stated show that there is imminent danger of prejudicial action if notice be first given, injunction may be granted without notice, but the remedy by injunction is of such a nature that it should not be invoked except in extraordinary cases. Such is the practice in this county, that notice of application for injunction may be given the defendant and immediate application be made to the court to grant an order for temporary injunction and if the court can not hear the matter at once, he may set the time for hearing for an early hour and enter such order as will preserve the rights of the parties and hold the matters in controversy in *statu quo* until such hearing, and a court with power to grant an injunction may be found in session substantially at all hours of the day. Board of Trade v. Riordan, 94 Ill. App. 298; Leiter v. Baude, 99 Ill. App. 64. There is no allegation that the defendants are financially irresponsible.

We decide upon the facts of this record that the injunction in this case was improperly issued without notice.

The order will be reversed and the injunction dissolved.

105 586
a204s 325

Joseph N. Barker, Trustee, et al. v. William Fitzgerald.

1. EQUITY JURISDICTION—*Will Give Affirmative or Defensive Relief.*—A court of equity will give appropriate affirmative or defensive relief, as may be required by the circumstances, from the consequences of any mistake of fact, which is a material element of the transaction concerning which relief is sought, and which mistake is not the result of the mistaken parties' own violation of some legal duty, provided that no adequate remedy can be had at law.

2. MISTAKE—*A Mental Condition.*—A mistake is always a mental condition or conception. This may be either active or passive. When active, the mental condition or belief may be that a certain matter or thing exists which really does not exist, or that a subject-matter or thing existed at some past time, which did not really exist.

3. SAME—*Must Be Material to Transaction to Entitle a Party to Relief.*—A mistake, to entitle a party to relief on account thereof, must be material to the transaction, affecting its substance, and not merely one of its incidents; and the mistake itself must be so important that it determines the conduct of the mistaken party or parties. To warrant a rescission the evidence of this must be clear and positive.

4. SAME—*Only Reasonable Diligence Required.*—While reasonable diligence is required of all parties in the transaction of business, it is not enough to prevent relief, in case of a mutual mistake, that the party complainant might, had he done all within his power, have ascertained the truth.

5. RESCISSION OF CONTRACTS—*Condition of Affairs Must Be Such that a Substantial Restoration Can Be Made.*—In order to entitle a party to a rescission of a contract on the ground of a mutual mistake, the condition of affairs must be such that a substantial restoration can be made.

Bill to Cancel a Lease.—Appeal from the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Affirmed. Opinion filed January 30, 1903.

This is an appeal from a decree of the Circuit Court canceling a certain lease upon terms and conditions stated in the decree. The testimony taken in the case and embraced in the record here presented is very voluminous. From the report of the master to whom the cause was referred it appears that November 1, 1892, Joseph N. Barker, as trustee, Carrie L. W. Hoops, and Charles H. Hoops, executed a lease of the premises known as 167 and 169 Wa-

bash avenue to William Fitzgerald for the term of ninety-nine years, beginning October 1, 1892, at a rental of $15,000 per annum. The lease contains a recital that lessors, in consideration of rents and $25,000 to be expended by the lessee in adding two or more stories to present building and improving same to the extent of that sum, and in consideration of the covenants on the part of the lessee, leased unto him the premises for the term mentioned. The lessee covenanted that he would within two years from May 1, 1893, expend the sum of $25,000 upon the premises, by adding thereto two stories upon the building then situated upon 167 and 169 Wabash avenue, and in other betterments and improvements of the then existing building, the plan for such improvements to be submitted and to be made reasonably satisfactory to the lessor; and that when the said additions and improvements should be made, they were to inure to the benefit of and become the property of the lessors, and should be made at the cost of the lessee, free from all mechanics' and other liens on said premises.

The master further reported that early in 1894, the lessee had plans of the two additional stories required by the lease, which plans were submitted to the lessors, but were not carried out by the lessee, because his investigation had satisfied him that the existing walls and foundations of the building would not carry two additional stories, unless the walls and foundations were reinforced and strengthened, to do which, he contended, would cost, including the two extra stories, a very large sum of money, in excess of the $25,000 which he had agreed to expend in putting on the two additional stories and other betterments of the building.

The master further found that the building in question, owing to the condition of the walls and foundations as the same existed at the time of the making of the lease, would not, with safety, have admitted of the construction of the two additional stories required by the lease; that the existing walls and foundations would not have carried the two

additional stories contemplated by the lease, without a large expenditure of money, in changing and strengthening the walls and foundations, and that said necessary work would to a great extent have changed the method of the construction of the building by requiring additional walls and foundations and interior supports, and that the adding of the two additional stories, including the necessary changes and work of reinforcing the walls and foundations, could not have been done for $25,000.

The master found that both Barker and Fitzgerald were mistaken as to the condition of the building, its walls, foundations and supports; that Barker, in negotiations leading to the lease, expressed himself as entertaining no doubt that the building would carry the two additional stories, which opinion he doubtless at that time honestly held, and which opinion unquestionably was an important factor in the mind of Fitzgerald and tended largely to influence him in the making of the lease.

The master found that there was a mutual mistake of fact by the parties as to the strength of the building and the sufficiency of the existing walls and foundations to carry the two additional stories, and that such mistake of fact was largely induced on the part of Fitzgerald by the statements of Barker honestly made.

The master found that in conversation between Barker and Fitzgerald, prior to the making of the lease, both agreed in the opinion that Fitzgerald could not afford to pay the rent agreed upon, unless two additional stories were added to the building so as to produce a larger income for the lessee; that in such conversation it seems to have been taken for granted by Barker that the construction of the building was such as to warrant the placing thereon of two additional stories without further or other cost than such as would be caused by the construction of those stories and without reinforcing or strengthening the existing walls and foundations. As to this the master found that Barker was mistaken and concludes that in his judgment there was in law no such misrepresentation made by

Barker or any of the lessors as to existing facts relating to the strengthening or condition of the foundation or the walls of the building which Fitzgerald had a right in law to rely upon when he made the lease in question, because the master finds that whatever was said by Barker or any of the lessors as to this matter must be held in law to have been the expression of their opinion relative thereto.

Upon the hearing of the cause it appeared that after the making of the lease in question an ordinance of the city of Chicago was enacted by which Fitzgerald and all other persons were forbidden to increase the height of such a building, unless it was converted into a fire proof structure, a thing which, without a complete reconstruction of the entire building, it was practically impossible to do. The court did not altogether agree with the master, the chancellor finding upon the submission of the master's report to him, that the lease in question was executed under a mutual mistake by the parties as to material facts and that but for such mutual mistake the parties would not have executed the same; and in consequence of such mutual mistake, the minds of the parties never met, and the lease never became the agreement of the parties, and should, as a matter of equity, at the instance of the complainant, be rescinded, canceled, set aside and for naught held, and be treated in all respects as if it had never existed. The chancellor further found that the subject-matter of the lease is the real estate described, which can be restored to defendants, and the parties thereto can be placed, by the decree of this court, in substantially the same condition as that occupied by them respectively before the execution thereof; that complainant ought to restore the possession of the premises and pay the defendants a reasonable sum for the use and occupation thereof from the date of the lease, October 1, 1892, up to the filing of the original bill, October 6, 1894, and for a reasonable period beyond that time, to enable the defendants to place the premises in tenantable condition, and to secure tenants therefor, which time the court fixes as March 1, 1895; that the reason-

able amount to be paid by complainant to defendants for such use and occupation the court finds from the evidence amounts in the aggregate to $27,813.87, and complainant should be credited with all sums he has paid to or for defendants, for and on account of his use and occupation of the premises during the period aforesaid, which sum the court finds from the evidence is $17,841.66, leaving a balance of $9,972.21, which ought to be paid by complainant to defendants.

BARKER & CHURCH, CRATTY, JARVIS & LATIMER and CHESTER E. CLEVELAND, attorneys for appellants.

A. B. JENKS, JOHN MAYO PALMER and WILLIAM HOWARD FITZGERALD, attorneys for appellee.

MR. PRESIDING JUSTICE WATERMAN delivered the opinion of the court.

A court of equity will give appropriate affirmative or defensive relief, as may be required by the circumstances, from the consequences of any mistake of fact which is a material element of the transaction concerning which relief is sought, and which mistake is not the result of the mistaken party's own violation of some legal duty, provided that no adequate remedy can be had at law.

A mistake is always a mental condition or conception. This may be either active or passive. When active, the mental condition or belief may be that a certain matter or thing exists which really does not exist, or that a subject-matter or thing existed at some past time, which did not really exist. Pomeroy's Eq. Jurisprudence, Sec. 852–854–856; Grymes v. Sanders et al., 93 U. S. 55–60; Hurd v. Hall, 12 Wis. 125–138; Haven v. Foster, 9 Pickering, 112.

The mistake found by the master and the court in the present case was that a certain condition then existed which did not exist, namely, that the walls and foundations of the building were then sufficiently strong to admit of the placing of two stories thereon. A mistake, to entitle a party to relief on account thereof, must be material to the transac-

tion, affecting its substance and not merely its incidents; and the mistake itself must be so important that it determines the conduct of the mistaken party or parties. To warrant a rescission the evidence of this must be clear and positive. Ewing v. Sandoval Mining Co., 110 Ill. 290; Kerr on Fraud and Mistakes, 408; Grymes v. Sanders, *supra;* Carpmael v. Powis, 10 Beav. 36–44.

While reasonable diligence is required of all parties in the transaction of business, it is not enough to prevent relief, in case of a mutual mistake, that the party complainant might, had he done all within his power, have ascertained the truth. Kelly v. Solari, 9 Meeson & Welsby, 54; Bell v. Gardiner, 4 Manning & G. 11; 4 Scott's New Reports, 621; Newton v. Tolles (N. H.), 9 L. R. A. 50.

In the present case it has been found by the master and the chancellor, and it clearly appears from the evidence, that the lease in question would not have been made had not all the parties thereto believed that the walls and foundations of the building were then strong enough to permit the placing thereon of two additional stories. By the placing of these stories Fitzgerald expected that the rentals of such building would be so increased that he could afford to pay $15,000 per annum rent, and there is evidence tending to show that both Barker and Fitzgerald expressed the opinion before the lease was made that without such additional stories, Fitzgerald could not pay $15,000 per annum rent. It was made a condition of the lease that such additional stories should be placed upon said building, all of which was at the expiration of the term to become the property of the lessors. Appellant forcibly asks, if Fitzgerald and Barker believed that the walls and foundations of the building were strong enough to support two additional stories, and if but for such mistaken belief the lease would not have been made, how it happened that such alleged vitally essential condition to the making of a valid and enforceable contract was not inserted in the lease. A similar question might be asked in every case wherein a rescission of a contract is sought upon the ground of a

mutual mistake as to a material matter concerning the subject-matter of the contract. In the illustrations most frequently given in text books dealing with this question, that of the sale of a ship at sea not existing at the time of the making of the contract, in such case had the contract provided that it was to be null and void in case the ship was thereafter found not to have been existing when the contract was made, no suit would have arisen. It is perhaps the case that parties never, in the making of a contract, provide for everything then existing but which if first ascertained thereafter may materially affect the obligation of the parties. As before stated, it does not follow that every mutual misunderstanding or mistake as to the subject-matter of a contract will authorize its rescission. The vital question in this matter is: First, was there a mutual mistake as to the condition of the walls of the building; second, was such a mistake so material to the making of the contract, such an inducement to its execution, that but for it the contract would not have been made. A reading of the lease, the written evidence of what the parties agreed to, with the deduction to be drawn from this evidence, tends strongly to the conclusion that but for the mutual understanding of the parties that the walls of the building were strong enough to support two additional stories thereon, the lease would not have been entered into.

It is true that by the decree, the building, in the condition in which it was at the time of the execution of the lease, is not and can not be restored to appellants. None of the tenants then occupying it were there at the entry of the decree; the rent roll is variant; the rental value of the building is not the same. Under a receiver appointed either by mutual agreement or without dissent, substantial changes and alterations have been made in the structure. Nevertheless, it appears that by the restoration of the building, and a money decree in connection with rents heretofore received by appellants, they are placed in substantially the position they were when the lease was made. In the case of the rescission of a sale of improved

premises, there can never be a perfect restoration, line for line and corner for corner. The premises when restored are altered; they have suffered the decay incident to time and exposure. There may have been decline or rise in value; the property may have become more or less desirable. The character of the occupation for renting purposes which its situation demands may have greatly changed. As to all these things, there can not be a complete restoration of the *statu quo*, nor does equity demand it. In such a case a court of equity having come to the conclusion that the party complainant is entitled to a rescission, endeavors to put the parties in the condition they would have been, had not, by reason of their mutual mistake, the contract been entered into; and as before stated, in order to entitle a party to such rescission the condition of affairs must be such that a substantial restoration can be made. Neblett v. Macfarland, 92 U. S. 101-103.

That there was a mutual mistake as to the condition of the walls and foundations of the building, and that but for such mistake the lease would not have been made, as well as that this mistake was as to a material and important matter affecting the substance of that concerning which the contract was, and the contract itself, there was such evidence that we ought not to overturn the conclusions of the chancellor upon the facts in dispute. The evidence of mutual mistake is clear. A case of a mutual mistake of fact as to a material matter affecting the substance of a transaction affords grounds for an application by either party for a rescission. It may, therefore, be well to consider whether the lessors could have had a rescission had they so applied.

If the lease had been for one hundred dollars per annum, and it appearing, as from the evidence it fairly does, that the placing of two more stories upon this structure, already seven stories high, would have greatly endangered the entire building and perhaps completely ruined it, appellants would probably have applied to have the contract rescinded, saying that the contract permitting, nay, requiring the placing of two additional stories thereon would never have been made had not both parties been, when the con-

tract was entered into, mistaken as to the strength of walls and foundations. To this, what reply, under the evidence and findings in this case, could Fitzgerald have made? Would a court of equity, having before it the record of this case, allowed him to go on and break down the building by the weight of the additional stories he had contracted to place thereon? The record does not show such laches upon the part of appellee in calling for a rescission as forbids relief to him.

An objection is made to the allowance of fees to the master. The court allowed to the master the statutory fees for taking testimony. It appears that by agreement the parties employed a stenographer, and paid him fifty cents a page for reporting the testimony. Thus the master was saved the labor of writing out the testimony. No portion of the fifty cents per page was received in any way by the master. Notwithstanding that the master did not have to write down the testimony, he had to listen to it, examine and certify to the correctness of every word transcribed by the stenographer or change the same to correspond with the actual testimony. That done by the parties was not at the master's request and was doubtless a great saving to the parties in the way of time and solicitor's fees.

The instance is entirely unlike that commented upon in Schnadt v. Davis, 185 Ill. 476.

We see no reason for interfering with the order of the court as to costs. The decree of the Circuit Court is affirmed.

Mr. Justice BURKE took no part in this case.

---

105 544
107 [1]150
a205s 144
105 544
115 [2]217

Warren Springer v. Fred Schultz, by His Next Friend.

1. PASSENGER ELEVATORS—*Liability of Person Operating is the Same as That of a Common Carrier.*—It is the settled law in this state that the liability of a person operating a passenger elevator is the same as that of a common carrier. Persons operating elevators for raising and

lowering persons in buildings are carriers of passengers and subject to the same rules applicable to other carriers of passengers. It is the duty of such carrier of passengers, upon the ground of public policy, to use extraordinary care in and about the operation of such elevators so as to prevent injury to persons therein.

2. SAME—*Happening of Accident Raises a Presumption of Negligence.*—The happening of an accident to a passenger during the course of his transportation raises a presumption that the carrier has been negligent. The burden of rebutting this presumption rests with the carrier.

3. PLEADING—*Not Necessary that the Declaration Should Describe Injuries as Permanent.*—It is enough that the declaration shows the injury received, without describing it in all its seriousness, and the recovery may be to the whole extent of the injury. The permanency of plaintiff's injury is merely evidence to be considered by the jury in determining its severity.

4. NEW TRIALS—*Character of Newly Discovered Evidence.*—To warrant a court in setting aside a verdict, the newly discovered evidence must be such as ought on another trial to produce an opposite result on the merits.

5. SAME—*Where Newly Discovered Evidence is Merely Cumulative.*—Where newly discovered evidence is not conclusive in its character, but is merely cumulative and contradictory of other evidence, or in its nature impeaching, it affords no ground for a new trial.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. GEORGE W. PATTON, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Affirmed on remittitur. Opinion filed January 30, 1903.

Statement.—Fred Schultz, a minor, brought this suit against Warren Springer, on account of injury received in the fall of a passenger elevator in a six-story building owned by Mr. Springer in Chicago.

Schultz was working for one of the tenants in that building and claims that while he was riding down on the elevator as a passenger, the elevator car fell off the cable and dropped six stories with him on the 24th day of October, 1899, and he was thereby injured.

On the top of the building was a cupola immediately over the elevator shaft in which were two sheaves or grooved wheels, each about thirty-six inches in diameter, set at an angle to each other, in V shape. Over each of these sheaves pass two wire cables, and the elevator car was suspended by

four cables attached to it at its upper part, and passing from it up over the sheaves or wheels at the top of the shaft. Two of these cables, after going over the pulleys, pass down in the sides of the elevators and support counter weights. The other two cables pass down to the basement of the building and around the drum of the steam engine by which the car was raised and lowered.

At the top of the elevator cage, passing through the cross-beam of the car, was a shackle bolt; the upper end or head of this bolt was fan-shaped, containing four holes through which the cables passed and were fastened to the bolt. The bolt passed through the cross-beam at the top of the cage, and on the lower end of the stem was screwed a nut, thus holding the bolt in place and connecting the cables and the car. The shackle bolt was about seven inches long and in its lower part one and one-half inches in diameter; beneath the thread of the lower end of the bolt was a hole through it about five-eighths of an inch in diameter through which a cotter or clinch-pin could be passed after the nut was screwed up in place, this cotter-pin being an extra precaution to prevent the nut coming off.

The declaration consists of one count and states that the plaintiff, a minor, was a servant of one of the tenants of defendant in his said building; that defendant received the plaintiff to be carried upon said elevator as a passenger, whereupon it became the duty of the defendant to use all due care in the management of said elevator and in keeping the machinery thereof in good care and condition; yet the defendant then and there carelessly and negligently permitted the machinery, engines, brakes, safety-stops, governors, wheels, cables, drums, bolts, nuts, screws, fastenings and various parts of the said elevator to be and remain in bad and defective repair and condition, although by the use of due care defendant could have known of and remedied the same defective repair and condition before the happening of the injury complained of; and defendant so carelessly and negligently ran, managed and operated the said elevator while the plaintiff was with all due care

riding as a passenger thereon, that it fell; whereby plaintiff was greatly injured, etc., and became sick, etc., and has suffered and will hereafter suffer great pain for the term of his life; and thereby divers bones of the plaintiff were broken and dislocated and his mind and nervous system greatly injured and divers internal organs of his body were injured, to the damage of plaintiff in the sum of $25,000.

Issues were joined and a jury trial followed resulting in a verdict of $25,000, upon which judgment was entered.

O. W. DYNES, attorney for appellant; WILLIAM J. AMMEN, of counsel.

FRANCIS J. WOOLLEY, attorney for appellee.

MR. JUSTICE BURKE delivered the opinion of the court.

In this case the jury found the issues for the plaintiff below and assessed his damages in the sum of $25,000, and for this amount judgment was entered. Appellant, Mr. Springer, insists that he was not guilty of the negligence charged, and if guilty, still the verdict was grossly excessive, and at all events, because of newly discovered evidence, he should have been given a new trial.

First: Upon the question of negligence, the entire record of this case must be considered, not to determine upon which side the evidence preponderates, but to learn whether there is evidence substantial and sufficient to sustain the finding of the jury; and if we so find, we will not disturb their verdict and the judgment entered thereon. The plaintiff, Fred Schultz, about eighteen years of age, was at work in the engraving business conducted by a tenant of Mr. Springer on the sixth floor of the Springer Building. At the close of work, about five o'clock in the afternoon of October 24, 1899, with the intention of going home, he stepped into the elevator, then occupied by the elevator operator and three other parties. It appears from the evidence that almost immediately thereafter, while a passenger, and in the exercise of all due care for his own safety, and

without the slightest contributory negligence on his part, the elevator fell from the sixth floor to the basement and he was thereby injured as claimed in his declaration. This evidence made out a *prima facie* case for the plaintiff. In case of accidents because of a defect in the machinery or appliances of an elevator, and where the passenger is in the exercise of reasonable care for his own safety, the rule as to the burden of proof is the same as exists against common carriers of passengers. It is the settled law in this state that the liability of a person operating a passenger elevator is the same as that of common carriers. Persons operating elevators for raising and lowering persons in buildings are carriers of passengers and subject to the same rules applicable to other carriers of passengers. It is a duty of such carrier of passengers, upon the ground of public policy, to use extraordinary care in and about the operation of such elevators so as to prevent injury to persons therein. Hartford D. Co. v. Sollitt, 172 Ill. 222; Springer v. Ford, 189 Ill. 430.

The happening of an accident to a passenger during the course of his transportation raises a presumption that the carrier has been negligent. The burden of rebutting this presumption rests with the carrier. Undoubtedly, law requires plaintiff to show that the defendant has been negligent, but where the plaintiff is a passenger in the exercise of reasonable care, a *prima facie* case of negligence is made out by showing the happening of the accident. N. Y. C. & St. L. R. R. Co. v. Blumenthal, 160 Ill. 40.

The fact of the falling of the elevator is evidence tending to show want of care on the part of defendant. Hartford D. Co. v. Sollitt, *supra;* Springer v. Ford, *supra.*

We are next to inquire whether the evidence introduced in the case, fairly considered, shows that the accident was not due to the negligence of defendant as charged in plaintiff's declaration. The evidence is voluminous and we can do no more than call attention to a few of the salient features appearing in a record of most conflicting evidence.

As appears from the statement, the elevator was sus-

pended by cables attached to a bolt which passed through the upper cross-beam of the elevator and was made fast thereto by a nut screwed on the under side of and up against the cross-beam.

Immediately after the accident the nut was found at the bottom of the elevator shaft. The linchpin designed to go through the bolt under the nut to keep it from unscrewing was not found. A large amount of evidence was introduced as to the condition of the elevator and its appearance at the time of and prior to its fall.

Appellant, Mr. Springer, contends that he exercised due care in causing said elevator to be inspected and kept in good and safe condition.

If the linchpin had been in place the nut could not have come off and the elevator would not have fallen. The elevator boy testified that there was no pin through the hole in the bolt while he was there; that the nut was loose and had been for several weeks; that he told the chief engineer to fix it a few minutes before the accident; he felt the elevator shaking; that the cables twisted and he was obliged frequently to go on top of the cage to straighten them.

Another witness testified that within a week or two of the time it fell, the elevator was exceedingly noisy and ran unsteadily; that the inside of the linchpin hole was quite full of rust. A witness testified that about noon on the day of the accident there was no pin in the bolt; that the engineer then turned the cables with a wrench which he put below the nut and with his hand twisted the cables; that about three weeks before the accident he was on top of the elevator and there was no pin in the bolt at that time; that the twisting of the cables was a regular occurrence; and on the day before the accident he told the elevator boy that he "ought to put something in the hole." James Myers, a machinist and city elevator inspector, testified that he made an examination after the accident; that the nut had signs of rust all over it except at the top; that there were no markings of any kind on the bottom of the nut; and that the first thread was torn off; that there is a

slight tendency for the shackle bolt to jar with the running of the cable as well as with the teetering or jarring of the car in its travel. A witness who had frequently operated the elevator stated that "the cables used to twist around and then it was necessary to turn them back again; the nut on the bolt used to get loose and the engineer fixed it; there was no linchpin in the bolt for many weeks before the accident."

On the other hand, as to the condition of the elevator, the defendant introduced witnesses, several of whom were or had been in his employment and whose duty it was to watch and keep the elevator in repair. They testified that the elevator was frequently inspected before and up to the day of the said accident, in all its parts, including nuts, bolts, cotter-pins and other machinery thereof, and always found in good working order. It was denied that the cables became twisted, but admitted that there was some pounding of the engine two or three days before the accident, but it was claimed that the necessary repairs were made on the Sunday before the elevator fell. One witness, who had charge of repairing the Springer elevators, testified that on the day of the accident he tried the nut with a monkey-wrench. He stated the cotter-pin was in; that he had no fear the nut would come off, but did it because it was his custom.

There is a conflict in the evidence as to the twisting of the cables, the vibration of the machinery, the teetering motion of the elevator.

The defendant's evidence tended to show that the nut might work off, and proper precaution required a linchpin in the bolt. A witness was called in rebuttal who testified that he had seen cables attached to a bolt, as in this case, twisted one-quarter way around. In answer to a question by the court put to a witness—who had intimated that the nut would not come off even if there was no linchpin in the bolt—what twisted the nut off, he replied that the nut could work off by not having anything to lock it; the thread being an inclined plane, the nut would certainly

work down; that even the weight of the car on it would tend to twist it off. Another witness for defendant stated that the whole machine "is full of vibration." Doubtless sufficient of the evidence has been quoted to show that there is in it an irreconcilable conflict.

The ingenuity of counsel goes far to explain some parts of the evidence. However, it still remains that the nut was unscrewed down to the last thread, which was stripped off; that the elevator did fall; that no cotter-pin was afterward found about the premises. The mind can conceive it possible that the statements of defendant's witnesses, that a few hours or days before the accident the nut was screwed up tight and that the cotter-pin, properly spread, was in its place, are correct, but the truth of such testimony is highly improbable. It is within the range of speculation that an enemy of Mr. Springer may have come on the day of the accident and removed the cotter-pin; but according to one of his witnesses that would not have been sufficient to have accomplished the diabolical deed, for he stated that the nut without a pin in its place would not have worked down. But this evilly-disposed person must have unscrewed the nut so that it barely hung by one or more threads. Another theory indirectly suggested is that the linchpin was removed and the nut unfastened to test the Elithorp safety device; but this theory is without evidence, and in view of the presumption against suicide, is unworthy of consideration. After a most careful perusal of this record we are forced to the conclusion that Mr. Springer and his employes did not exercise proper care in placing the elevator and its machinery in reasonably safe condition for passengers in the exercise of due care while riding thereon.

Second: However, appellant insists that if he was proved guilty of the negligence charged in plaintiff's declaration, still, that the amount of the verdict rendered was excessive. To determine the merits of this contention an examination of all the evidence bearing upon the character and extent of appellee's injuries has been made and the result thereof will be briefly stated. At the time of receiving the injury

appellee was eighteen years of age and engaged in finishing letters in making brass plates and had been so engaged for two years and upward prior to the accident. After the accident, for some days, he complained of pain in his back and foot, and he received a scar on his nose and eyelid and the left eye was inflamed and so remained for about ten days; and he states that newspaper print at the present time appears blurred to him; that when he attempts to help lift a weight of 100 pounds he suffers in his back; that his right leg was yellow and black up to the knee for a period of seven weeks after the accident, and is now painful when the weather changes; that if he makes a misstep he suffers great pain in it, and walks with a cane; that after the accident he felt heart trouble, but that trouble is now disappearing; that he returned to his work about four months after the accident; that he now receives $8 per week and before the accident $5 per week from the same people. Dr. Camfield, eye and ear specialist, testified that he had examined appellee and found that his left eye was about one-third below the normal standard of vision and in his opinion would not improve. Dr. Venn testified that he attended appellee at about the time of the accident; that he was suffering from an injury to the foot, the hand and the spine; that he had a gash on the eye. The doctor further stated that there is a noticeable curvature of the spine in the dorsal portion thereof of about half an inch outward and half an inch inward; that in his opinion the curvature will not interfere much with the organs inside but will weaken the spine, and that he does not think that the boy can now sit up a whole day without reclining and giving his spine a rest. As to the foot the doctor states that there is a fracture of the bone called the astragulus, the bone which with the shin forms the ankle joint and at the time of the accident the astragulus was broken and slipped back and has now formed an artificial or false joint; this artificial joint will cause great pain and will prevent lateral movement and cause a chronic inflammation of the synovial membrane; that he can not walk very far without sitting down

and that the present condition of the ankle joint is permanent; the doctor further states, as to the future of the young man, that he will not be able to carry burdens on his back, but if he does ordinary physical labor and takes good care of himself, and avoids excessive exercise, and especially if he has any kind of educational pursuit, then that he may "go to the end of his career without his trouble impeding him a good deal." Dr. McGregor, a physician and surgeon, substantially corroborates the foregoing statements of the medical experts. No attempt was made to contradict or disprove the statements of these physicians and surgeons. The existence and seriousness of plaintiff's injuries and the permanency of those in the back and ankle can not be questioned. The opinion of the physicians is that his spine trouble will not improve but rather grow worse; at all events that he can not follow pursuits requiring severe physical labor, and their unqualified opinion is that his ankle is incurable; that its lateral motion is entirely gone, and its forward motion is greatly impaired, and that the ankle is permanently weakened; that the vision of his left eye is permanently reduced one-third below its normal condition; but it is their belief that there are kinds of work, sedentary or intellectual, in which he may experience little difficulty and go to the end of his life with a fair degree of success.

Counsel for appellant has referred to some decisions of this court on the subject of excessive verdicts. This court has never assumed to fix a valuation upon the various parts of the human body, and say that a jury must be governed thereby in determining their verdicts in personal injury cases, but this court has said that the trial judge should correct a verdict which is grossly excessive, and that if the trial court fails to do its duty in this respect, this court will require a remittitur or reverse the judgment where the verdict is excessive.

Counsel for appellant has referred to some holdings in this court as to what amounts of verdict are excessive. In Chicago & N. W. Ry. Co. v. Kane, 70 Ill. App. 676, a verdict of $20,000 for the loss of an arm was held excessive

in the case of a young man twenty years of age who left school at twelve years of age, and who, prior to his injury, worked at paper-hanging for $1 per day.

In the case of C. & E. I. R. R. Co. v. Cleminger, 77 Ill. App. 186, the practice of allowing a remittitur is recognized and followed. This procedure avoids the delay and expense of a re-trial and subserves the ends of justice. It is true, a court has no right to substitute its estimate of damages for that of the jury, but the court does have the right to say that beyond a certain amount there is, in any reasonable view of the case, absolutely no evidence to sustain the amount of damages fixed by the jury. Now, in view of the nature of appellee's injuries, his earning capacity, education and station in life, what maximum verdict could have been recovered beyond which we could say because of the entire want of evidence the jury were not justified in going?

A verdict for $25,000 for the loss of a leg above the knee, by a common laborer, fifty-two years of age, was reduced by remittitur to $15,000, and judgment entered by the trial court and that judgment was affirmed in this court.

In C., M. & St. P. R. R. Co. v. Walsh, 57 Ill. App. 448, a verdict of $29,583 was held excessive, but cured by remittitur down to $16,000. Many cases appear in the books in which judgments have been entered and affirmed in cases where remittiturs of from twenty-five to forty per cent of the original verdicts have been made.

In cases of liability courts are reluctant to disturb the verdict of a jury, founded upon substantial evidence, when the verdict is not so excessive as to imply prejudice or passion on the part of the jury. In the case at bar we are unable to find that anything was done or said to indicate any prejudice or passion on the part of the jury. It is not a matter for surprise that a jury would be quite liberal in assessing the damages in a case where they had evidence to believe that the defendant had been guilty of the negligence charged in this case resulting in transforming the plaintiff from the health and vigor of young manhood

into a cripple unable to bend freely or to walk or stand long upon one of his feet, the spine and several of the internal organs of the body being wrested from their natural position and the sight of one of his eyes reduced one-third below its normal condition.

It frequently happens that jurors, inexperienced in contemplating so serious injuries as those sustained by the plaintiff, and unaccustomed to estimate in money the damages therefor, are, perhaps, disposed to consider what they would take to be deprived of strong feet, of erect spines and of good eyes, and appreciating the almost inestimable value of these parts of the body, assess the damages in a case like the one at bar, at too liberal an amount; therefore, we do not feel, after a thorough examination of this record, that the verdict, though excessive, was inspired by passion or prejudice on the part of the jury; however, considering the earning capacity of plaintiff—that his occupation does not require severe physical labor, and other conditions, we do not find evidence in the record sufficient to warrant the amount of the verdict, but are of the opinion that the jury, to arrive at the excessive amount of their verdict, must have taken, of their own motion, into consideration elements of damage not proper under the evidence of this case.

It is argued that inasmuch as the injuries are not specifically described as being permanent, that therefore the admission of evidence as to the permanence of plaintiff's injuries was improper. There is no force to this objection. It is enough that the declaration showed the injury received, without describing it in all its seriousness, and the recovery could be to the whole extent of the injury. The permanency of plaintiff's injury was merely evidence to be considered by the jury in determining its severity. W. C. St. R. R. Co. v. McCallum, 169 Ill. 240; C. of C. v. Sheehan, 113 Ill. 658; C. C. Ry. Co. v. Hastings, 136 Ill. 251; Eagle Packet Co. v. Defries, 94 Ill. 598.

It follows from the foregoing authorities that the jury was properly instructed as to the measure of damages for permanent injuries.

It is further urged that testimony of injury to the eyesight ought not to have been submitted to the jury because this injury is not specifically pleaded. The declaration charges that the plaintiff was bruised and injured and became sore and disordered, and suffered great pain and will for the term of his life, and that divers bones of his body were dislocated and broken and his mind, brain and nervous system injured, and divers internal organs of his body hurt and injured. It would be difficult to draft or conceive of a more comprehensive averment of all possible injuries to the body, external and internal, than are there set forth. In W. C. St. Ry. Co. v. Levy, 182 Ill. 525, it is said:

"The contention is that the evidence showed that the condition of the optic nerve was produced by defective nutrition and not by any direct injury received in the accident; that it was not the natural and necessary result of the injury, and not having been alleged as special damages it could not be proved. It is not necessary to allege specially every injury to each part of the body in actions of this character. Injury to the back, spine and brain was alleged and the evidence tended to show that such injury was the natural and proximate cause of the defective nutrition to the optic nerve and impairment of the plaintiff's eyesight. The damages claimed, therefore, were not special but general, and could be recovered without being declared for specially."

The evidence in the case at bar shows that the eyelid was bruised and eye inflamed, and therefore it was fairly inferable that the eye, theretofore sound, was impaired by such injury to it and its covering. The declaration in the cases to which appellant's counsel have referred, limited the charges of injury to some part of the body, and the additional averments of sickness, soreness, and disorder, by fair interpretation in those cases referred to the injuries specifically alleged and were but amplified and general descriptions thereof. Such is not the declaration before us. We are therefore of the opinion that the testimony with reference to the injury to the eye was admissible. We have considered objections to the modifications made by the court

to the defendant's instructions and are of the opinion that no substantial error was committed.

It is urged that remarks prejudicial to the defendant's case were made in the presence of the jury. Counsel for appellee indirectly suggested on the *voir dire* that an insurance company was interested in the case, but owing to the prompt ruling of the court and to the equally prompt disclaimer of the counsel of any knowledge that an insurance company was interested in the suit, we are of the opinion that no damage was thereby done to the defendant. If appellant had feared the effect thereof it would have been entirely competent for him to have asked an instruction and it would have been the duty of the court to have given it, repelling any presumption therefrom prejudicial to him or his case. It did become apparent in the progress of the trial, without the fault of appellee, that the insurance company was interested in the case. Where an insurance company in fact takes the place of the defendant and defends a case it is extremely important for the plaintiff to know fully the relations and feelings of the juror toward the insurance company in order wisely to exercise the right of challenge. It is possible and proper for counsel so to frame questions to jurors as not to state the interest of an insurance company and yet to learn the feelings of the juror toward the company. It is to be noted, however, that the interest of an insurance company can not be completely concealed from an intelligent juror who has been thoroughly interrogated as to his knowledge of and relations to a certain insurance company.

In Sawyer v. Arnold Shoe Co., 38 Atl. Rep. 333, it incidentally appeared from a writing introduced that an insurance company was interested and the court in his charge to the jury called special attention of the jury to the contention that the defendant exercised no care because insured. This charge was held to be error because of its tendency to divert the minds of the jury from the real issue in the case. No such occurrence took place in the case at bar.

In Iroquois Furnace Co. v. McCrea, 91 Ill. App. 337, the

opinion does not state in what manner it appeared that the attorney in that case represented the insurance company, but reads as follows: "It appears that an attorney representing the insurance company was present with the attorneys for appellant at the trial," and there it was held that questions relating to the insurance company were proper for the purpose of enabling counsel to exercise their right of peremptory challenge. In the case at bar it further sufficiently appears from the record that the insurance company was interested in the case. In the light of the evidence in this case we hold that the remarks made by appellee's counsel did not tend to create prejudice against appellant.

Third: It is finally urged that a new trial should have been granted because of newly discovered evidence. To warrant a court in setting aside a verdict, the newly discovered evidence must be such as ought on another trial to produce an opposite result on the merits. 18 Am. & Eng. Ency. of Law, p. 564, and many authorities cited in note; Kendall v. Limberg, 69 Ill. 355.

Where newly discovered evidence is not conclusive in its character but is merely cumulative and contradictory of other evidence, or in its nature impeaching, it affords no ground for a new trial. Appellant should have exercised reasonable diligence during the long period that elapsed between the accident and the trial to have secured all his evidence. Kendall v. Limberg, 69 Ill. 355; Knickerbocker Ins. Co. v. Gould, 80 Ill. 388; Tobin v. People, 101 Ill. 121; City of Paris v. Morrell, 52 Ill. App. 121.

After a careful perusal of the affidavits presented by appellant upon his motion for a new trial, we find no statement therein which is not cumulative, contradictory of testimony on the trial, in its nature impeaching merely, and in no sense, when considered with the evidence in the case, conclusive, or of such nature that we can say that if introduced on another trial on the merits, would change the result. From the abstract it appears that the court did not consider counter affidavits on the motion for a new trial.

Considering the entire record we are of the opinion that the judgment of the Superior Court should be affirmed, provided a remittitur of $10,000 be entered in this court within ten days, otherwise the judgment will be reversed and the cause remanded.

J. Ramsay Flood v. Consumers Company.

1. NUISANCES—*What Use of Property Creates.*—In order to create a nuisance from a use of property, the use must be such as to work a tangible injury to the person or property of another, or such as renders the enjoyment of property essentially uncomfortable. It is not enough that it diminishes the value of surrounding property. It is not enough that it renders other property unsalable, or that it prevents one from letting his premises for as large a rent as before, or to as responsible tenants. It must be such a use as produces a tangible or appreciable injury to the property, or as renders its enjoyment essentially uncomfortable or inconvenient.

2. SAME—*Erection of an Unsightly Structure is Not.*—The erection by an owner of any species of structure upon his land, however rude or cheap or unsightly, is not of itself a nuisance.

3. SAME—*Character, When in Doubt, Must be Established in an Action at Law.*—Where it is doubtful whether the structure is a nuisance or not, or where the manner of its use alone determines whether it is a nuisance or not, its character as a nuisance must first be established in an action at law.

4. SAME—*When Claim to Relief is Based upon the Use to be Made of a Building Erected upon One's Own Ground.*—When a claim to relief is based upon the use which is to be made of a building erected upon one's own ground, the court will ordinarily refuse to enjoin the construction thereof; still, if such owner proceeds, he does so at his peril, and is liable to an injunction or an action of damages if such use results in a nuisance.

5. EQUITY—*Will Not Generally Restrain the Erection of a Building upon One's Own Property.*—A court of equity will not restrain the erection of a building by an owner upon his own property, unless it is clear that the business to be carried on therein will be a nuisance and that it can not be carried on therein so as not to be a nuisance.

6. INJUNCTIONS—*When the Act or Thing Threatened is a Nuisance per se.*—Ordinarily an injunction will be granted when the act or thing threatened is a nuisance *per se*, or necessarily will be a nuisance, and will be denied when it may or may not be a nuisance according to circumstances; or when injury apprehended is doubtful or contingent.

7. EQUITY JURISDICTION—*Over the Subject of Nuisances.*—The jurisdiction of equity over the subject of nuisances is not an original jurisdiction. This power was formerly exercised very sparingly and only in extreme cases, at least until after the right and question of nuisance had been first settled at law. While in modern times the strictness of this rule has been somewhat relaxed, there is still a substantial agreement among the authorities that to entitle a party to equitable relief before resorting to a court of equity his case must be clear and free from all substantial doubt as to his right to relief. To entitle him to come into a court of equity in the first instance there must be a "strong and mischievous case of pressing necessity."

Bill for an Injunction.—Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Affirmed. Opinion filed January 30, 1903.

The bill was filed in this case by appellant and others to enjoin Consumers Company from completing a building on Sixty-second street near Madison avenue in Chicago. The bill states that the Consumers Company is erecting upon its land a large wooden building designed for the storage of ice, and intends to store the same with ice and distribute daily therefrom by loading on ice-wagons drawn by horses, commencing the loading in the morning before daylight. Said building is about 100 feet square and forty feet in height and its outside walls are to be covered with a metal sheeting. Said building is to be constructed without windows or openings except where necessary to convey ice to and from it; that said building is and will be unsightly and not in harmony with the surrounding improvements, will destroy the character of the neighborhood as a first-class residence locality and will cause discomforts and inconveniences to those inhabiting and frequenting the neighborhood "which can not be known or set forth with certainty" and will cause a depreciation of the value of property in the neighborhood owned by complainant; that the presence of said ice-house will cause a large number of noisy and unsightly ice-wagons to be constantly in front of property owned by complainants and will cause noxious and disgusting odors from the horses to pervade the atmosphere of complainant's premises and that thereby said ice-

house and the maintenance thereof will constitute a nuisance; that there are costly flat buildings on appellant's land and other valuable flat buildings and residences within a distance of one block; that Jackson Park is one-quarter of a mile away; that the Illinois Central Railroad and the South Side Elevated Road have stations within two blocks of said property and surface lines within one block thereof. That said improvements were placed upon the property of appellant and the other complainants with the expectation that said locality would continue to be used as a first-class residence locality; that there are within one to five miles of said locality tracts of land suitable to the erection of ice-houses, factories, etc.

The prayer is that said structure and maintenance thereof as an ice-house be decreed to be a nuisance and that a temporary injunction be issued immediately and remain in force until a final hearing and then be made perpetual, enjoining the completion and maintenance of said building

SAMUEL B. KING and JULE F. BROWER, attorneys for appellant.

JOHN F. HOLLAND, attorney for appellee.

MR. JUSTICE BURKE delivered the opinion of the court.

The court denied the prayer for injunction in this case and dismissed the bill for want of equity.

The answer is abstracted by appellant; however, he protests that it should not be considered. His counsel state that if the bill shows no equity, it was proper to dismiss it even though an answer had been filed.

There were several complainants in this case. None have taken an appeal to this court except Mr. Flood. Appellant insists that the existence and maintenance of an ice-house, regardless of the noises and odors complained of, will depreciate the value of his property, and suggests that it is the duty of courts to protect the value of real estate investments by preventing the erection of objectionable structures in their neighborhood.

In order to create a nuisance from a use of property the use must be such as to work a tangible injury to the person or property of another, or such as renders the enjoyment of property essentially uncomfortable. It is not enough that it diminishes the value of surrounding property. It is not enough that it renders other property unsalable, or that it prevents one from letting his premises for as large a rent as before, or to as responsible tenants. It must be such a use as produces a tangible or appreciable injury to the property, or as renders its enjoyment essentially uncomfortable or inconvenient. M. & E. R. R. Co. v. Prudden, 20 N. J. Eq. 530.

In Gibson v. Donk, 7 Mo. App. 37, the plaintiff brought an action for a nuisance by the establishment of a coal yard near the premises; none of the usual concomitants of a nuisance were shown to arise from the yard, and the fact that it depreciated the rental value of the plaintiff's premises by its proximity thereto was relied on; but the court held that this was not sufficient to establish the fact of nuisance. Wood on Nuisances, Section 3 (2d edition).

A structure erected upon the owner's land is not a nuisance because it is capable of a use that will make it a nuisance. It may be, as appellant claims in this case, unsightly, and sheeted with iron. Such an unsightly structure would doubtless offend the eye and esthetic taste of the neighbors and tenants over the way; but there are many unpleasant things which must be borne in a crowded city if they do not trench upon any recognized legal right; and this is the case even though the things complained of materially lessen the value of surrounding property. The presence of elegant buildings upon a street greatly enhances the value of property upon the street for residential purposes, but this does not prevent an owner of property from making any species of erections thereon, however rude or cheap or unsightly, which are not otherwise a nuisance. C. E. & L. S. R. Co. v. Darke, 50 Ill. App. 280; Trulock v. Merte, 72 Iowa, 510.

The bill in this case states that the ice-house stands on the northeast corner of Madison avenue and Sixty-second

street, but does not state how far back from Madison avenue. We are informed by defendant's answer that there are 100 feet of vacant ground between the west line of the ice-house and Madison avenue, an ample amount of ground upon which to erect a building which would entirely conceal the ice-house from view on Madison avenue. As no inferences are to be drawn in favor of the bill we may assume that the ice-house does stand at the corner of these streets for purposes of general description, but as a matter of fact 100 feet away from Madison avenue and with its doors opening upon another street. Without expressly deciding that an unsightly structure does not in any case entitle an owner to recover damages to his property caused by the erection and maintenance of unsightly structures immediately in front of another's premises, nevertheless, under the circumstances of this case, we are of the opinion that though defendant's said structure was unsightly in its unfinished state or would continue to be unsightly in its completion, and though it would depreciate the value of defendant's property, still that the mere existence of the structure thus unsightly and having the effect to lessen appellant's property, does not constitute said structure a nuisance, and does not entitle the appellant to an injunction restraining the defendant from the completion thereof.

Our attention has not been called to a holding of any court that a building for the storing of ice, situated as the bill in this case alleges defendant's structure is located, is a nuisance *per se*. Appellant is unable to state what discomforts and inconveniences will arise to him because of the use to which the said structure may be put. He says that they can not be known nor set forth with certainty. Undoubtedly this last statement is correct, at least it would be mere speculation. Facts in this class of cases must be stated in the bill to show that the apprehension of injury is well founded. Payne v. McKinley, 54 Cal. 532.

It can not be known whether noises will come from the building in loading or unloading ice. It all depends upon how and with what care the work is done. The building is

to be closed up tight upon all sides except on the northern side, furthest removed from appellant's property. The sound of ice-wagons over the pavements will depend entirely upon the kind of pavements on the streets and the character of the wagons used. This matter may or may not be regulated by an ordinance of the city council and in any event it is altogether too conjectural in its consequences to require the extraordinary writ of the court.

It is suggested in the bill that offensive odors will come from the horses attached to the ice-wagons, being and standing near appellant's property. Again we say this objection depends entirely upon where the horses are stationed, their number and the care and attention given to them. If proper attention is given them, horses may be kept without any objectionable feature night and day upon a lot not to exceed twenty feet in width and 120 feet in depth upon which is erected a very costly private residence in one of the most exclusively residential districts in this city. Sheldon v. Weeks, 51 Ill. App. 314.

So that we are unable to say as a matter of fact that the presence of an indefinite number of horses, distant from appellant's property by perhaps 150 feet, with a cross-street intervening, would constitute, *per se*, a nuisance.

A court of equity will not restrain the erection of a building by an owner upon his property, unless it is clear that the business to be carried on therein will be a nuisance and that it can not be carried on thereon so as not to be a nuisance. Duncan v. Hayes, 22 N. J. Eq. 25; Iliff v. School Directors, 45 Ill. App. 419.

Ordinarily an injunction will be granted when the act or thing threatened is a nuisance *per se*, or necessarily will be a nuisance, and will be denied when it may or may not be a nuisance, according to circumstances, or when the injury apprehended is doubtful or contingent. Lake View v. Letz, 44 Ill. 81; Duncan v. Hayes, *supra*.

The jurisdiction of courts of equity over the subject of nuisances is not an original jurisdiction. This power was formerly exercised very sparingly, only in extreme cases, at

least until after the right and question of nuisance had been first settled at law. While in modern times the strictness of this rule has been somewhat relaxed, there is still a substantial agreement among the authorities that to entitle a party to equitable relief before resorting to a court of equity his case must be clear and free from all substantial doubt as to his right to relief. To entitle him to come into a court of equity in the first instance there must be a "strong and mischievous case of pressing necessity." Oswald v. Wolf, 129 Ill. 200; Nelson v. Milligan, 151 Ill. 462; The Windfall Mfg. Co. v. Patterson, 148 Ind. 414.

Even Mr. Wood, though an advocate of a very broad and liberal interpretation of the jurisdiction of courts of equity in matters of nuisance, from whose work on the Law of Nuisances, counsel so generously quote, admits that "in order to entitle a party to equitable relief, his right must be clear and the injury established, since in doubtful cases a party will be turned over to his legal remedy."

The question of what is a nuisance is one particularly fitted for investigation by a jury. The clearly established rule in the State of Illinois is that where it is doubtful whether the structure is a nuisance or not, or where the manner of its use alone determines whether it is a nuisance or not, that in all such cases its character as a nuisance must first be established in an action at law. Robb v. Village of LaGrange, 158 Ill. 21, and Illinois cases, *supra.*

When claim to relief is based upon the use which is to be made of a building erected on one's own ground, the court will ordinarily refuse to enjoin the construction thereof; still it is to be observed in such cases the defendant, if he proceeds, does so at his peril, and is liable to an injunction or an action of damages if such use results in a nuisance. Duncan v. Hayes, *supra;* Keiser v. Lovett, 85 Ind. 240; Eng. & Am. Ency. of Law (2d Ed.), "Nuisances."

After a careful examination we are of the opinion that the court in Gilbert v. Showerman, 23 Mich. 448, does not hold a doctrine contrary to the one just announced. To sustain their contention counsel for appellant refer to

Wylie v. Elwood, 134 Ill. 281. We do not think that this case in any respect whatever is an authority for the position taken by appellant; there the case was tried by a jury. The suit was an action on the case. Evidence was heard, certain facts found therefrom, and in that case it was shown that by the use of machinery and otherwise the handling of coal constituted a nuisance in that particular neighborhood. The case at bar has not proceeded to the same extent and the allegations of the bill do not show that it will in the future proceed to that extent.

In view of the indefinite allegations of the bill and of the uncertainty as to the manner in which the defendant's building and its surroundings may be occupied and used, we are therefore of the opinion that the bill in this case does not show that the appellee has created and is maintaining a nuisance; and we are further of the opinion that a preliminary injunction ought not to have been granted on the application therefor on the face of the bill; and in view of the statement of counsel in his brief that the bill ought to have been dismissed provided the allegations therein were not sufficient to warrant the issue of a preliminary and permanent injunction, we hold that the order and decree of the court were correct, both in denying the preliminary injunction and in dismissing the bill for want of equity.

Order and decree of the Circuit Court therein are affirmed.

---

105 566
a203s 888

Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Frank T. Kinnare, Adm'r.

1. EVIDENCE—*Showing Necessitous Condition of Widow and Next of Kin in Actions for Death by Negligent Act.*—In an action by an administrator to recover loss sustained by the widow and next of kin on account of his decedent's death, it is not error to show that the widow or next of kin was dependent or actually received support from the deceased, but it is error to show the necessitous condition of the widow and next of kin, as that they or some of them are blind, palsied, deaf or crippled

Trespass on the Case.—Death from negligent act. Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Affirmed. Opinion filed January 30, 1903.

This is an appeal from a judgment in a suit brought by the administrator of Thomas Mann, deceased, to recover loss sustained by his widow and next of kin on account of his death, which is said to have been caused by appellant.

The declaration states that the deceased, being a switchman in the employ of the Chicago Terminal Transfer Railroad Company, on the 6th of April, 1900, while engaged in his work for such company, was standing in such proximity to appellant's track that an engine belonging to it could not be run by him without striking him; that appellant, knowing the perilous condition of said Thomas Mann, then and there recklessly, willfully and wantonly backed its engine along its track without giving any warning of its approach by ringing a bell, contrary to an ordinance of the city of Chicago, and by reason of said negligent and willful act of the defendant, the said engine ran against the deceased and thereby injured him so that he died.

The second count of the declaration charges that appellant, knowing the danger of the deceased, recklessly, wantonly and willfully started up and backed its engine along its track upon and against the deceased, whereby he was run over and so injured that he died.

The third count is much like the first, except it charges that the engineer of appellant saw the deceased in a perilous position, and by ordinary care could have avoided injuring him, but negligently failed to do so. As a result of the trial there was a verdict and judgment for the plaintiff for $5,000.

Upon the trial it appeared that in the yard where the deceased was working were tracks of several railroad companies, among them that of the Chicago Terminal Company and that of appellant; that a short time before the deceased was struck he had thrown a switch on the tracks of the terminal company, that switch being between the

terminal track and the track of appellant; that after he threw the switch he stepped back, that is, stepped westward toward the east rail of appellant's track and looked toward the northeast. He seems then to have taken a book out of his pocket and to have been struck while making some memoranda therein, probably the number of an engine which had passed. In so stepping back he came so near to appellant's track that its engine proceeding northward struck him, inflicting injuries from which he died. The space between the tracks of the terminal company and those of appellant at the place where the deceased was when injured, was between ten and eleven feet, and there was no mark or line showing the division between appellant's grounds and those of the terminal company.

Appellant contends that the deceased stepped back so close to its track that he was struck by its engine proceeding northward, and that such stepping back was just before the engine reached him, and when its engineer, running its engine, it proceeding backward, could not see him from the cab in which he stood operating his engine. The fireman attached to appellant's engine was not on it at the time of or immediately before the injury.

Appellant introduced evidence tending to show that the construction of its engine was such that when its engineer stood in his proper place therein, it proceeding backward, he could not see a person upon its track in front of the direction in which it was going, if he were nearer than seventy feet from such engine; that when its engineer saw deceased he was from 150 to 200 feet from the engine, going northward, as was the locomotive, and that at that time he was between its track and that of the terminal company, and thus in a place where, had he remained, appellant's engine proceeding northward would have passed without injury to him.

There was a sharp conflict in the testimony as to whether the bell upon appellant's engine was ringing as it proceeded northward and when it struck the deceased. An ordinance of the city requires that the bell of each locomotive engine shall be rung continually while running within the city.

GEORGE WILLARD, attorney for appellant.

W. S. JOHNSON, attorney for appellee.

MR. PRESIDING JUSTICE WATERMAN delivered the opinion of the court.

Appellant contends that the deceased, at the time of his injury, was trespassing upon its tracks, and that it therefore owed to him no duty, except to refrain from wantonly or willfully doing him harm. The deceased undoubtedly was, when struck by appellant's engine, upon its right of way, and in a place where he ought not to have been. He was not in the vicinity of appellant's tracks as a mere interloper having no business there. He was a switchman working in a yard, along the surface of which ran the tracks of a number of companies, by one of which the deceased was injured.

The weight of the evidence seems to be that the deceased, but a very short time before he was struck, did in the discharge of his duties, step backward so that he came so near appellant's track that he was struck by its engine; and the weight of the evidence also seems to be that appellant's engineer, from his proper place in its engine, when it was backing, could not see one who was nearer than seventy feet from it in the direction in which it was going. The evidence was such that the jury had a right to find that the bell upon appellant's engine was not being rung as it proceeded northward, and it may be that had said bell been rung, the attention of the deceased would have been called to the approach of the engine, and he being so warned would have escaped injury.

The weight of the evidence also seems to be that appellant's engineer, proceeding backward, saw the deceased about 150 feet to the north and quite close to appellant's track, in a place where, as a matter of common prudence, he should have been warned by the ringing of the bell of the approach of appellant's engine, in order that he, not knowing thereof, might not, as he probably did, step back so close to appellant's track that he was struck by an engine of whose proximity and approach he was ignorant. The

ordinance of the city requiring the ringing of the locomotive bell upon an engine, while it is running in the city, has for its purpose not merely the warning of people to get off its track, but warning them not to go on, and said ordinance is designed for the protection of those whose duties require them to be in the immediate vicinity of railroad tracks, where locomotive engines are passing, as well as those whose ordinary duties keep them away from danger of being run over.

As to whether the conduct of appellant was under the circumstances wanton or willful is to be determined from all the facts under which the injury was occasioned. Appellant's engineer knew that he could not see a person to the northward of his engine who was nearer than seventy feet to the north of it. The engineer also knew that he was alone upon said engine, his fireman being away, and that consequently from the position where he stood, being unable to see any person who might be within seventy feet to the north of his engine, in the absence of his fireman, who might, had he been present, have seen where the engineer could not, it was a matter of ordinary prudence, more than usual incumbent upon him, to proceed with great caution, and to give, by ringing his bell, warning to any person who might, unseen by him, be near to the engine upon the track over which it wasproceeding.

We are not prepared to say that if, under any circumstances, he failed to ring the bell upon his engine, his conduct was not a wanton disregard of the safety of the deceased. Appellant urges that many objections which he made to the manner pursued by counsel for appellee in interrogating his own witnesses, and especially in asking, as appellant insists, leading questions, should have been sustained. We do not think there was such error in this regard as requires us to set aside the judgment of the court below. While it is not necessary that in such action as this it should be shown that the widow or next of kin was dependent or actually received support from the deceased, yet we do not think that the showing of such fact is error; while the showing of the necessitous condition of the

widow and next of kin, as that they are, or some of them are, blind, palsied, deaf or crippled, would be error. Pa. Co. v. Keane, 143 Ill. 172; St. Louis, Peoria & Northern Ry. Co. v. Dorsey, 189 Ill. 251; Chicago, Peoria & St. Louis R. R. Co. v. Woolridge, 174 Ill. 330.

It does appear to us that testimony was improperly admitted as to what a witness named Rusky had said to Mrs. Mann in a conversation had with her in June at Archer avenue. This conversation counsel for appellee introduced upon his claim that it was in contradiction of and thereby by way of impeachment of what Rusky, a witness for appellant, had testified to, but it was in contradiction only of that which had been drawn out from Rusky by appellee's cross-examination. We regard the declaration as sufficient to sustain the verdict and that appellant's motion at the close of appellee's case, to instruct the jury to find for the defendant, was properly overruled.

Counsel for appellee did upon his argument to the jury improperly comment upon the numerous objections to testimony which appellant had taken during the trial. The trial court sustained such objections. The other portion of the argument of counsel for appellee, we do not regard as so objectionable as to require any comment from us, especially as counsel for appellant did not insist upon or obtain any ruling of the trial court thereon. The accident occurred in a railroad yard where appellant knew the duties of switchmen required them to be and where they were likely to be found at almost any hour of the day. Appellant's engineer saw the deceased in near proximity to its track a very short time before he was struck. If he proceeded northward in a manner in which he could see nothing ahead of him that was not more than seventy feet from his engine, without ringing a bell as the ordinance required, he not only violated the law, but was grossly negligent of the safety of the deceased.

The case is a close one, yet we find neither of the instructions of which appellant complains, nor otherwise any error requiring the reversal of the judgment. It is therefore affirmed.

105 572
r205s 326

John Farson et al. v. Simon F. Fogg et al.

1. FRANCHISE—*Agreement of Street Railroad Company to Pave Street in Return for Consent of Abutting Owners to Construction of Road is Legal.*—An agreement of a street railroad company to cut, grade, curb, macadam and build the cross-walks in a street in consideration of the consent of the owners of abutting property to the construction of a line of street railroad in such street, is legal, and is not a purchase of frontage consent for a consideration inuring to the exclusive benefit of any such owner.

Bill for Specific Performance.—Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Affirmed. Opinion filed January 30, 1903.

Appellants' counsel assert that the bill of complaint in this case was exhibited to collect a penalty; whereas, appellees' counsel contend that its purpose was to compel the paving of Cheltenham Place, Chicago, or "if the court should deem it equitable, in view of the case, then to have a certain check held in escrow delivered up, and defendants Farson and Leach, by whom it was certified, compelled to pay it as per agreement."

It appears that complainants Fogg and Kinney were the owners of a tract of land fronting on Cheltenham Place and Bond avenue, upon which streets the Calumet Electric Street Railway Company was seeking a franchise to enable it to lay its tracks. To obtain such franchise for Cheltenham Place the consent of appellees was indispensable. The latter were opposed to laying the tracks on this particular street, believing, it is said, that it would be injurious to property there. As the result of negotiations with appellant Arthur B. Leach, a verbal agreement was made in accordance with which the railway company was to pave the street from Bond avenue to the east side of Lake avenue as a condition of the withdrawal of appellees' opposition. There is testimony tending to show that this proposition was made by appellants, and that appellant Leach said he would put up a certified check for $1,000 to guar-

antee the performance of the agreement, and to this Fogg, for himself and Kinney, agreed. Thereafter a contract in writing was drawn up, which was executed by appellees, and after their signatures appears the following: "The Calumet Electric Street Railway Company for value received hereby acknowledges that it has agreed to do said work according to said specifications as in the foregoing memorandum is stated and upon the conditions therein recited. (Signed) Calumet Electric Street Railway Co. John Farson, Gen. Manager." The railway has since gone into the hands of a receiver.

The written contract recites that the railway company has made application for a franchise or a license to build a one or two track electric railway on Cheltenham Place, and has agreed with appellants, who are the owners of property described, "to cut, grade, curb, macadam and build the cross-walks in said Cheltenham Place from curb to curb from said Bond avenue" to a point 480 feet east, according to specifications attached, "in consideration for and in full payment of the damages which said Fogg and Kinney will incur in connection with and by reason of the construction of said railway on Cheltenham Place, if the said corporation shall secure said ordinance, and that the undersigned, Farson, Leach & Co., being interested in said corporation and in the securing of said franchise and the construction of said road, to secure the faithful performance of said agreement by said corporation * * * if it shall secure said franchise in the meantime, have placed their certified check for $1,000, drawn upon the National Bank of Illinois, and made payable to William A. Hammond, vice-president, as trustee, to secure the faithful performance of said agreement." It is then provided that if the corporation shall pave the street as agreed, or if it shall not secure the franchise or license and shall withdraw its application therefor and return the petition, "then said check shall be returned to said Farson, Leach & Co. If said corporation has acquired * * * said franchise or license, and neither it nor the said Farson, Leach & Co.

has completed said work according to said specifications, said check shall thereupon be indorsed by said Hammond or his successor as vice-president of said bank, and delivered to said Fogg and Kinney by said Hammond or his successor, and said bank shall pay the same to said Fogg and Kinney upon said indorsement when made by said Hammond or his said successor, and said Fogg and Kinney shall have and hold said sum of $1,000 as and for liquidated damages for the failure of said corporation or said Farson, Leach & Co., to do said work." The check was subsequently drawn on Farson, Leach & Co. by the defendant Fuller, acting as attorney for said bankers and the railway company, was certified, and deposited in escrow as agreed.

Upon the hearing there was a reference to a master, who found the complainants entitled to receive payment of the check. The court approved the finding and entered a decree accordingly for the amount of the check and interest. From that decree comes this appeal.

JUDSON F. GOING, attorney for appellants; DANIEL V. GALLERY, of counsel.

ALEXANDER S. BRADLEY, attorney for appellees.

MR. JUSTICE FREEMAN delivered the opinion of the court.

It is said by appellants' counsel that the contract, the material parts of which are above stated, "is a contract made to conceal an oral agreement in violation of public policy." It is contended that the consideration of the contract in question was the sale of frontage consents to the railway company; that it was an attempt to do indirectly what can not be done directly, and that it is void because against public policy. What the consideration was is mainly a question of fact, upon which there is some apparent contradiction in testimony between Fogg and Leach, but which the master has settled against appellants. Fogg testifies that Leach "made the proposition to pave Cheltenham Place, if I would give my consent to this railroad going

around this corner; I accepted that proposition, provided I could be guaranteed that the pavement would be made, and he proposed to put a certified check for $1,000 up in escrow for the performance of that agreement; that is the exact facts and that is the trade." Leach does not contradict this, except as he says he told Fogg that without his frontage it would be impossible for the Calumet Railroad to run through Cheltenham Place, "and I made arrangements with him to pay him so much for that frontage. The amount to be paid was $1,000, on the terms that he was to sign for us and not for the other company."

It is conceded that the railway company secured its franchise from the city and has laid its tracks upon the street. Appellants and the corporation have the fruits of the contract, but desire to be released on their part from payment of conceded damages in compliance with its terms. What is said in Jackson v. Horton, 126 Ill. 566–576, is fairly applicable to this state of facts. "In return for these advantages he (it) has parted with nothing. Surely it is not equitable that one party to an agreement of settlement should reap all the benefits and that the other party should receive no benefit whatever."

What the contract was, must be obtained from the written instrument. By its terms, it is what appellee Fogg in his testimony above quoted states, an agreement on the part of the company to pave the street "in consideration for and full payment of the damages which said Fogg and Kinney will incur in connection with, and by reason of, the construction of said railway on said Cheltenham Place if the said corporation shall secure said ordinance." The existence of any corrupt agreement is denied by appellees, and if any such agreement was in mind or spoken of between the parties they have not stated it in the written instrument, which embodies their final agreement. The master finds from the evidence that said agreement was made "to protect and satisfy complainants as to the damages which complainants claimed would accrue to their said property by the construction of said line of railway." This finding

appears to be justified by the evidence, and we find no good reason for questioning its correctness. No suspicion would probably attach to the contract, were it not for the fact that the appellants could not obtain the franchise without the consent of appellees, the owner of the frontage, and that the purchase by appellants of a frontage consent from appellees would be illegal. Doane v. Chicago City Railway Co., 160 Ill. 22–31. In that case it is said that "an agreement based upon the purchase of the abutting owner's consent to the laying of the proposed tracks in a public street is illegal as being against public policy and will not be enforced by the courts." If the contract in controversy was such an agreement, there would be an end to the case. But such is not its meaning as therein expressed. In the Doane case, *supra*, the court states the point decided thus: "The question then arises whether the consent of a property owner to the laying of a street railway in the street upon which his property abuts, can be purchased for money, or for a consideration inuring to the exclusive benefit of such owner." The contract here under consideration does not purport to be and evidently was not for the exclusive benefit of such owner, if carried out according to its terms. It was for the public benefit that the street should be paved, and other property owners as well as appellees would be compensated by such paving to that extent for such damages as the construction and operation of the railroad might involve. We are not aware of any considerations of public policy which forbade the railway company from making good to the public and the property owners damages which are occasioned by its appropriation of a part of the street for its tracks and cars. Such provisions are frequently inserted in ordinances by which franchises are granted, with a requirement that as a condition the company shall pave the street upon which it is permitted to place its tracks. This is ordinarily a just and equitable provision. The fact that a street railway imposes no additional servitude upon a public street does not by any means compel the conclusion that it may not in fact inflict dam-

age upon the public as well as upon the private owners of abutting property, which it is equitable to require the railway company to lessen as much as possible by improvement of the street in a compensatory way.

It is insisted, however, that, if the contract was made in good faith, the payment of $1,000, though called "liquidated damages" in the writing, is in fact a penalty, and that only such damages can be recovered as shall be shown by evidence to have been suffered by the failure to perform promptly at the time set. The contract recites, as above stated, that the agreement to pave is made "in consideration for and in full payment of the damages which said Fogg and Kinney will incur in connection with and by reason of said railway on said Cheltenham Place, if the said corporation shall secure said ordinance." It then recites, that "to secure the faithful performance of said agreement by said corporation on or before September 1, 1896, if it (the corporation) shall secure said franchise in the meantime," Farson, Leach & Co. have put up their certified check, to be paid to appellees if the paving is not done as agreed, said Fogg and Kinney to "have and hold said sum of $1,000 as and for liquidated damages for the failure of said corporation, or said Farson, Leach & Co., to do said work." The tracks were laid in Cheltenham Place in June, 1896, and it was not until December following, when it became apparent the contract for paving was not to be complied with, that appellees demanded the check. The substance of the agreement is that appellees will be damaged by the railway on Cheltenham Place; that in consideration for and payment of such damages the corporation or appellants will pave the street; that if they fail to do so they will pay $1,000 as liquidated damages caused by such failure. It is true the fact that a sum to be paid is called liquidated damages by the parties does not always control. Courts will look to the nature and purpose of the agreement. Scofield v. Tompkins, 95 Ill. 190. In the case before us, appellants recognized and conceded that the railway would damage appellees' property unless it was offset

by paving the street, and failing to do this they agreed in lieu thereof to pay the thousand dollars as an equivalent for the loss of the benefit to be derived from the paving. The contract bound appellants or the corporation to take the necessary steps to obtain the city's permission and to provide and to pay the expense of a public improvement which they conceded was needed to offset the damage they proposed to inflict by their use of the street. They have obtained the benefit they desired, and have inflicted the damage which they anticipated. They are getting off now by paying an equivalent to only one of the property owners damaged. We find in this transaction no real ground for regarding the payment as a penalty for the prompt performance of the agreement. It is true a limit of time was fixed within which the work was to be done. But the parties agreed that the payment was to be for damages, and the facts in evidence seem to have warranted such an agreement. The agreement settled the amount of damages which might otherwise be uncertain, and no good reason appears in this case for holding that to be a penalty which the parties have said was an equivalent for damages inflicted. The check operated as an equitable assignment of the fund, and transferred the title thereto to appellees under the conditions of the agreement. National Bank of America v. Nat. Bank of Illinois, 164 Ill. 503; Wyman v. Fort Dearborn Nat. Bank, 181 Ill. 279–283.

It is said the decree is incomplete and fails to settle all the equities. So far as the parties to the litigation are concerned, it disposes of the questions involved. Appellants were clearly actual parties to the agreement, notwithstanding the manner in which it is signed. The check as eventually made was drawn on Farson, Leach & Co., bankers, and by them certified. No reason appears why they should not pay it. Finding no material error in the record the judgment of the Circuit Court must be affirmed.

Chicago City Ry. Co. v. Thomas D. Mauger.

1. INSTRUCTIONS—*Declaring Liability or Freedom from Liability.*—Any instruction by which the court assumes as a matter of law to direct a verdict for either party or to declare the liability, or freedom from liability, of either party in the action, must embrace all the evidence which, under the pleadings and the evidence, are essential to a verdict.

2. SAME—*Referring to Case as Alleged in the Declaration.*—It is the duty of the trial court to point out what are the issues of fact which the jury are to try. A mere reference to the declaration as containing a statement of the plaintiff's case, is not a pointing out of either the issues to be tried or the plaintiff's case. The giving of such an instruction is error.

3. STREET RAILROADS—*Superior Right to Portion of Street Occupied by Tracks.*—The interests of the public require that the cars of a street railroad shall not be unreasonably delayed by the conduct of others using the street. For this purpose and to this extent the general right of the company over that portion of the street where the tracks lie is superior to that of other persons using the streets.

4. DAMAGES—*Plaintiff Not Entitled to Damages for Mere Humiliation or Mental Annoyance.*—In an action predicated upon negligence to recover for personal injuries thereby sustained, a plaintiff is not entitled to damages for mere humiliation or mental annoyance which he may suffer on account of bodily injuries. Instructions stating the elements of suffering or loss on account of which a plaintiff is entitled to recover should not be so drawn as to include mental humiliation.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Reversed and remanded. Opinion filed January 30, 1903.

WILLIAM J. HYNES, JOHN B. BRADY and C. LE ROY BROWN, attorneys for appellant; MASON B. STARRING, of counsel.

J. D. RILEY, attorney for appellee; RUFUS COPE, of counsel.

MR. PRESIDING JUSTICE WATERMAN delivered the opinion of the court.

This is an appeal from a judgment for $8,000 rendered in a personal injury suit. An accident happened on the first of August, 1899, appellee then being in the service of Irwin Brothers, whose place of business was at numbers 334 and

336 Clark street, Chicago, being near Harrison street and about 600 feet south of VanBuren street.

Appellee contends that upon the morning of August 1st he had delivered one load of meat for his employers, and between seven and eight o'clock was returning to the place of Irwin Brothers with his empty one-horse wagon to get a second load, and driving south on Clark street along and over the west track of the street car company; when he arrived at Irwin's meat market, in order to get his wagon into a position to receive another load, it was necessary for him to back from the car track to the sidewalk into a vacant space between other wagons standing there, one a wagon belonging to Swift Brothers and the other a delivery wagon of Irwin Brothers; that, as he approached Irwin's place, he threw the wheels on the right hand side of his wagon just outside the car track and immediately in front of Irwin's meat market; that he began to turn his horse, first having cast his eye back along the track to see if any car was near; that seeing none, he swung the horse sharply to the right and proceeded to back his team; that then, still remaining on the track, he straightened his horse, and moving forward two or three feet in order to avoid hitting the wagon in his rear, swung his horse sharply to the right, and continuing his effort to back in, had got his wagon off the track, except the north or left front wheel, which was still on the track, when his wagon was struck by appellant's motor car, proceeding southward on the track over which he had just driven; and by force of the contact of the motor car with his wagon, he was thrown from his seat on the wagon to the street.

The distance from the curb line of the street in front of Irwin's meat market to the first rail of appellant's west track is 16.2 feet. Appellant contends that just before the wagon upon which appellee was seated was struck by the car, the wagon was standing in front of Irwin's store, and when appellant's train of cars was about forty feet from the place of the accident, appellee drove his horse out from the sidewalk and onto the track; that appellee then

saw the approaching car and made a futile attempt at moving his horse and wagon out of the way; that appellant's train was running at from five to eight miles an hour, and as soon as the motorman saw appellee attempting to drive upon the track, he rang the gong upon the car and shouted to plaintiff to get out of the way and immediately applied the brakes, reversed the power and made every effort to stop the train; that it had rained the night before and the track was very slippery and gummy; and notwithstanding the utmost effort by the motorman to stop, the condition of the track was such that the train could not be stopped until the motor car came in contact with the front wheel of appellee's wagon, shoving it for a distance of seven or eight feet; that the cars were moving very slowly when the wagon was struck, and practically nothing, by the contact, was damaged about the wagon; that the wagon was pushed with some little force, and as the car, or immediately after the car and wagon stopped, the plaintiff slid or fell from his seat on the wagon to the ground. No bones of the plaintiff were broken and he sustained no dislocations of ligaments, tendons or muscles.

The evidence adduced in support of the conflicting theories of appellant and appellee, left the question of the cause of the accident, that is to say, the alleged negligence of appellant, and the exercise of ordinary care by appellee, in great doubt; so that the jury should have been carefully and correctly instructed as to the issue they were to try and the law bearing upon the evidence.

At the instance of appellee the court gave to the jury the following instruction:

"It is the duty of a street railway company to exercise ordinary care to avoid injury to persons who may be rightfully driving on or along its tracks; and it is the duty of persons driving in front of approaching cars not to unnecessarily delay such cars, but to exercise care to get out of the way of an approaching car; and if the jury believe from the preponderance of the evidence that the plaintiff was driving along the track of the defendant and undertook to back off of said tracks to a position along the sidewalk,

then whether the plaintiff, under the circumstances, exercised ordinary care or not, to get out of the way of the approaching car, is a question of fact to be determined by the jury from the preponderance of the evidence; and if the jury believe from the preponderance of the evidence that the plaintiff did exercise ordinary care in that regard, and that the defendant was negligent, as charged in the declaration, and the plaintiff was injured in consequence thereof, then the defendant is liable for such injury."

The instruction, as it did, having stated that if certain facts were found, the defendant was liable for the injuries occasioned by the accident to the plaintiff, the instruction should have contained all the facts which would authorize the verdict, in effect, directed by the instruction. Any instruction by which the court assumes as a matter of law to direct a verdict for either party or to declare the liability or freedom from liability of either party in the action, must embrace all the evidence which, under the pleadings and the evidence, is essential to a verdict. Pardridge v. Cutler, 168 Ill. 504–513; Lake Erie & Western R. R. Co. v. Wilson, 189 Ill. 89; Chicago City Ry. Co. v. Dinsmore, 162 Ill. 658; McNulta v. Jenkins, 91 Ill. App. 309; C., M. & St. P. Ry. Co. v. Halsey, 133 Ill. 248.

It is fundamental that in an action predicated upon negligence of the defendant, a plaintiff can not recover if he failed to exercise ordinary care and such failure contributed in any way to the accident. Under the evidence in this case the question as to the exercise of ordinary care by the defendant was not merely whether he exercised ordinary care to get out of the way of the approaching car, but also whether, in getting in the way of appellant's car, he was exercising ordinary care. There would have been no necessity for his exercising any care to get out of the way of the approaching car, if he had not first gotten into its way. The instruction under consideration declares that if appellee exercised ordinary care to get out of the way of the approaching car—that is to say, it tells the jury that if they believe from the preponderance of the evidence that the plaintiff did exercise ordinary care in that regard, and that

the defendant was negligent, and the plaintiff injured in consequence of such negligence of the defendant—then the defendant is liable for such injury. As before stated, the plaintiff was bound to exercise ordinary care as to his being in the way of appellant's approaching car and he was bound to exercise ordinary care in looking out for the approach of appellant's cars. The place where the injury occurred was not a street crossing; and as appellant's cars can not leave the fixed track upon which they run, it was the duty of appellee to exercise ordinary care not to be in the way thereof and so hinder and delay cars in proceeding at such rate of speed as they are authorized to do by the ordinances of the city. The interests of the public required that appellant's cars should not be unreasonably delayed by the conduct of appellee. For this purpose and to this extent the general right of appellant over that portion of the street where the injury occurred was superior to that of appellee. N. C. Elect. Ry. Co. v. Peuser, 190 Ill. 67.

The instruction is also objectionable as giving the jury to understand that whether the plaintiff, in what he did, exercised ordinary care, is a question solely of fact. To be sure the word solely is not used, but the statement that it is a question of fact had a tendency to leave in the minds of the jury the impression that it was one purely of fact. Such an instruction is condemned by Mr. Justice Cartwright, in Chicago, Burlington & Quincy Railroad Company v. Greenfield, 53 Ill. App. 424.

The instruction is also objectionable, hypothetically directing, as it does, a verdict for the plaintiff, in that especial attention is called to the theory and evidence of the plaintiff as to the accident, without mention of, or reference to the evidence and theory of the defendant. The court, at the instance of the plaintiff, gave the following instruction:

"The court instructs the jury that if they find from the evidence in this case that the plaintiff has proved his case as alleged in the declaration, by a preponderance of the evidence, then they should find the defendant guilty, and assess the plaintiff's damages, if any, at such sum as you

believe from the evidence will fairly and reasonably compensate him for the injury sustained by him, if any, as the direct result of the accident in question."

What the jury would, from an examination of the declaration, consider the plaintiff's (his) case, it is impossible to tell. That he was injured in consequence of the violent contact of appellant's car with a wagon upon which appellee was seated, was certainly a portion of his case as alleged in the declaration. That the jury would understand that necessarily his case embraced more than this, can not be known.

The Supreme Court of this State has frequently said, that it is the duty of the trial court to point out what are the issues of fact the jury are to try. A mere reference to the declaration as containing a statement of the plaintiff's case, is certainly for the average juror, not a pointing out of either the issues to be tried or the plaintiff's case.

It is not always easy for well-educated lawyers, thoroughly trained in their profession, to determine accurately what the case stated by the declaration is; and there are not wanting instances in which courts have disagreed as to this.

The giving of an instruction substantially like the one now under consideration was held error in Chicago, Rock Island and Pacific Railway Company v. Cleveland, 92 Ill. App. 308.

In North Chicago Electric Railway Company v. Peuser, 190 Ill. 67, the refusal to give the following instruction was held to have been in error:

"The jury are instructed that, by reason of its convenience to the public as a carrier of passengers, and because of the inability of its cars to turn out, a street railway company is invested with the right of way over other vehicles over the portion of street occupied by its tracks, and it is the duty of the drivers of such vehicles to turn out and allow its cars to pass, and to use care not to obstruct and delay the same, and if the jury believe, from the evidence, that the plaintiff, while neglecting such duty, and failing thereby to use ordinary care for his own safety, was injured, then he can not recover in this case."

This instruction, or one substantially like this, asked by appellant, should have been given.

In an action predicated upon negligence to recover for personal injuries thereby sustained, a plaintiff is not entitled to damages for mere humiliation or mental annoyance which he may suffer on account of bodily injuries. Instructions stating the elements of suffering or loss, on account of which a plaintiff is entitled to recover, should not be so drawn as to include mental humiliation. It is unnecessary to comment upon the amount of the judgment, as the case is one in which the error in that regard, if any, would not be cured by a remittitur.

The judgment of the Superior Court is reversed and the cause remanded.

Fred Griesheimer v. Fred Bothman.

1. EVICTION—*Defined.*—The term eviction was formerly used to denote an expulsion by the assertion of a paramount title and by a process of law, but it is now applied to every class of expulsion.

2. LANDLORD AND TENANT—*Action of Tenant Kept Out of Possession by One Holding the Paramount Title.*—If a sub-tenant is kept out of possession by one holding the paramount title, the lessee may have an action. The measure of damages in such cases is not limited to nominal damages. The lessee is generally allowed to recover the value of the term over and above the rent reserved and unpaid, or to accrue, together with other damages naturally resulting from the breach.

Debt, on a lease, for breach of covenant. Appeal from the Circuit Court of Cook County; the Hon. MARCUS KAVANAGH, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Affirmed. Opinion filed January 30, 1903.

Statement.—This is an action in debt on a lease for breach of covenant for quiet possession. The lease was executed by Fred Griesheimer to Fred Botham July 2, 1897, of store and basement, number 39 Clark street, term to commence August 1, 1897, and terminate August 30, 1900, at a monthly rental of $175, payable in advance, except for August rent, which was made payable at the time of the

execution of the lease; and therein defendant warranted that he had good right and title to make said lease and that plaintiff might hold the premises for said term in quiet enjoyment. Fred Griesheimer, appellant, held these premises as lessee from his lessors, Adsit and others, to be occupied for a clothing business, under lease running from November 19, 1894, to April 30, 1900, with a covenant not to underlet without the written consent of lessors. Plaintiff below, in his declaration, avers that Griesheimer did not have the right to sub-let said premises; that Adsit and others had paramount title as against the right of Griesheimer to execute such lease; that after the execution thereof Adsit and others, July 9, 1897, filed a bill of complaint praying for injunction against both Griesheimer and Botham, and on August 11, 1897, the court entered an order directing Griesheimer not to allow Botham to occupy said premises, and on September 17, 1897, made said order permanent, and that since August 11, 1897, Botham has been prevented from occupying same, and has suffered damages in a large sum.

Issues were joined and a trial had resulting in a verdict for plaintiff in the sum of $350.

B. M. SHAFFNER, attorney for appellant.

E. S. CUMMINGS, attorney for appellee.

MR. JUSTICE BURKE delivered the opinion of the court.

The propriety of a finding in this case that Mr. Griesheimer is liable to his tenant is not questioned; but it is insisted that under the evidence and the law applicable thereto only nominal damages ought to have been recovered. Botham was evicted from the premises by the paramount title of Adsit and others. Appellant claims that the eviction of Botham did not take place through the fraud or willful acts of himself and that therefore only nominal damages should have been recovered.

It is insisted that there is a material distinction in cases of eviction by paramount title and those resulting from the fraud or willful acts of the lessor.

Botham moved his furniture and fixtures into the store in July, 1897, at a cost of $15. He paid $23.83 for plumbing, $38 for signs, $27.66 for carpenter work and $175 as rent for August and had a watchman in the premises for several days.

Owing to the conflict in the evidence the case was one for the jury and the issues have been found for the plaintiff. Through the lease of July 2, 1897, Griesheimer demised to Botham, by written lease, the premises in question and therein covenanted that he had good right and title to make such lease and that Botham, the lessee, might hold and occupy the premises in quiet enjoyment for the term therein provided. Harms v. McCormick, 132 Ill. 104.

Botham was evicted under the order for injunction issued against him August 11, 1897, and thereby the covenant of quiet enjoyment contained in the lease to him from Griesheimer was broken.

Adsit and others asserted and enforced through the process of the law a title paramount to the title of Griesheimer. The term eviction was formerly used to denote an expulsion by the assertion of a paramount title and by a process of law, but it is now applied to every class of expulsion. 11 Am. & Eng. Ency. of Law (2d Ed.), p. 458.

In this case it is contended on the part of Botham that before accepting his lease he had not been informed and was not aware that Griesheimer did not have the right to sub-let to him. On the other hand, Griesheimer claims that before signing the lease he informed Botham that the lease from Adsit contained a clause restraining the sub-letting without Adsit's consent and that Botham stated that he would accept the lease and take his chances. It however appears that subsequent to all of said negotiations, a written lease was executed by the parties thereto which contained a covenant on the part of Griesheimer that he had a good title and that Botham should have the quiet enjoyment of said premises.

If a sub-tenant is kept out of possession by one holding the paramount title, no doubt the lessee may have an

action. The measure of damages in such cases is not limited to nominal damages. Gazzolo v. Chambers, 73 Ill. 75.

We understand the rule laid down in New York and followed in Pennsylvania to be that where the eviction was under a title paramount and the lessor acted in good faith in the letting, only nominal damages could be recovered. This doctrine, which on its face shows inadequacy of the compensation awarded the tenant, has not, however, been followed as a general rule, and the lessee has generally been allowed to recover the value of the term over and above the rent reserved and unpaid or to accrue, together with other damages naturally resulting from the breach. 18 Am. & Eng. Ency. of Law (2d Ed.), 628; Dobbins v. DuQuid, 65 Ill. 464.

In the case at bar and not as in Dobbins v. DuQuid, *supra*, the lessor, Griesheimer, had not forgotten that he had no right to sub-let, but admits that he knew that the Adsit lease contained a clause preventing him leasing the premises without the written consent of the lessors. Nevertheless, knowing full well that in making the lease to Botham he was doing what he had no right to do, he stated in writing and covenanted that he had good right to do what he admits he had no right to do. If, as he insists, he had, prior to the signing, made a different agreement with his lessee, it was his privilege and duty to have incorporated that agreement into the covenants and conditions of his lease to Botham.

Regardless of the rule as to the measure of damages in case of eviction by the paramount title, we are of the opinion that under the evidence in this case the plaintiff, Botham, was entitled to recover as damages naturally flowing from the breach assigned, the items of charge for moving and other incidental expenses. The verdict in this case is extremely moderate, the main item thereof being the advance rent for the month of August paid by the plaintiff, though restrained from occupying the premises. It would necessarily extend this opinion to comment upon the instructions given, but we are satisfied that they do not

contain error sufficient to work reversal of the case. It is urged by appellee's counsel that the sole ground of complaint, namely, excessive verdict, was not stated in the trial court and is presented here for the first time. If the grounds for a new trial were stated in the written motion for a new trial and an excessive verdict was not mentioned, we would not consider such ground here; but the record is silent as to this portion of the proceedings and we have therefore elected to consider the merits of the case.

The judgment of the Circuit Court is affirmed.

Nils Arneson v. Elizabeth B. Haldane.

1. EVIDENCE—*Certificates of Redemption Competent to Show Sums Paid for Redemption from Tax Sales.*—Certificates of redemption are certificated copies of the record of redemption within the meaning of section 197 of the revenue act, which requires the clerk, when any tract or lot shall be sold, to enter on the record the quantity sold and the name of the purchaser, and upon redemption requires an entry "of the name of the person redeeming and the date and amount of redemption in the proper column," and Sec. 212, which provides that the books and records belonging to the office of the county clerk, "or copies thereof certified by said clerk, shall be deemed *prima facie* evidence to prove the sale of any land or lot for taxes or special assessments, the redemption of the same or payment of taxes or special assessments thereon."

2. INTEREST—*Allowed on Mortgage Note by Decree of Foreclosure.*—The mortgagee, upon foreclosure, is entitled to interest on the mortgage note at the contract rate from the date of the note until the rendition of the decree of foreclosure.

Bill to Foreclose.—Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANECY, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Affirmed. Opinion filed January 30, 1903.

This is an appeal from a decree of foreclosure upon three mortgages, given by appellant herein and one Thore Tollakson, now deceased. Each separate mortgage secured a promissory note for $6,000, each note bearing interest respectively at five per cent per annum, executed by the

same parties. Before default had occurred upon the notes, or any of them, the mortgagors sold and conveyed the land covered by the said mortgages to one Carson, who assumed and agreed to pay the notes secured thereon. Afterward, one of the makers of the notes, the said Thore Tollakson, died. A third portion of the indebtedness has been paid, and a corresponding portion of the land was released from the lien of the mortgagees. Default having been made in payment of the remaining debt and interest, appellee filed her bill to foreclose and obtained a decree from which this appeal is prosecuted.

DENEEN & HAMILL, attorneys for appellant.

RUNNELLS & BURRY, attorneys for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

It is first urged that error was committed in allowing appellee certain sums paid for redemption from tax sales, because, as it is claimed, there was no competent evidence of such payments. The proof complained of was made by the introduction of certificates of deposit for redemption made by the county clerk, which, it is urged, are not made evidence by any statutory provision and were not admissible.

We are referred to sections 163, 197, 210 and 212, Chap. 120 R. S., the revenue act, which, taken together, it is claimed by appellee's counsel justify the introduction of the certificates of redemption in evidence. We concur in this view. Section 197 requires the clerk, when any tract or lot shall be sold, to enter on the record the quantity sold and the name of the purchaser, and upon redemption requires an entry "of the name of the person redeeming and the date and amount of redemption in the proper column." Section 212 provides that the books and records belonging to the office of the county clerk "or copies thereof certified by said clerk, shall be deemed *prima facie* evidence to prove the sale of any land or lot for taxes or special assessments, the redemption of the same or pay-

ment of taxes or special assessments thereon." In Bush v. Stanley, 122 Ill. 406–419, this precise question is passed upon and it is said: "We think these certificates are, within the meaning of this section, certified copies of the record of redemption."

It is claimed further that the decree includes about $23.30 and interest, more than the certificate states was actually deposited. This amount is made up, however, of the amount allowed by the statute (Sec. 56, Chap. 53, R. S.) to the county clerk for fees for redemption certificate, filing and cancellation, and noting tax sale on collector's warrant, for each tract or lot of land upon each of the certificates in evidence. These, when paid by the person redeeming, are a proper charge, and no reason appears why they should not have been included in the decree.

It is contended that the decree errs in re-stating the account, instead of following the master's report. This contention is based upon section 3, chapter 74 of the Revised Statutes, which provides: "Judgments recovered before any court or magistrate shall draw interest at the rate of five per centum per annum from the date of the same until satisfied. When judgment is entered upon any award, report or verdict, interest shall be computed at the rate aforesaid from the time when made or rendered to the time of rendering judgment upon the same, and made a part of the judgment." The master's report computed interest on the notes to the date of the report. The decree computed interest to its date at the contract rate, this contract rate being seven instead of five per cent, which latter is the amount it is contended should have been charged on the totals in the master's report. This would require resting the account at the date of the master's report, and then computing interest thereafter on the amount found to be due by the master, involving the compounding of interest upon interest. Such method of computation would, we think, without doubt, be improper. Appellee was entitled to interest "from the date of the note until the rendition of the decree." Barker v. Inter-

national Bank, 80 Ill. 96–101. Judgment, however, was not in this respect "entered upon any award, report or verdict," within the meaning of the statutes. The court, instead of entering judgment for the amount found due at the date of the master's report, substituted therefor its own computation of interest to the date of the decree at the contract rate, as it had a right to do. In Goodwin v. Bishop, 145 Ill. 421, it is said: "As interest had accrued after the report was filed, the court had the undoubted right to refer the case to the master to determine the amount then actually due, or the court could, if it saw proper, compute the interest without a reference." The court did so compute interest in the case before us. We are aware that a different conclusion may appear to be stated in Patterson v. Patterson, 89 Ill. App. 406–411. But we do not regard the rule as there stated, as being in conflict with the view we have expressed. In that case the master's report was formally confirmed, and the decree was inconsistent therewith, which is not this case, so far as appears from the record before us. We find, therefore, no error in this respect. If counsel prefer to remit the small amount constituting the difference, they have the privilege of doing so, although we regard the decree as correct.

It is insisted that the decree is erroneous in finding appellant personally liable for any deficiency. It is argued by appellant's attorneys that Carson, who purchased the mortgaged premises from the mortgagors and assumed and agreed to pay the mortgage indebtedness, is primarily liable, and that appellant and Tollakson were in the position of sureties for Carson. More than two years prior to filing the bill in controversy, Tollakson died testate and his will was admitted to probate. The estate was solvent, and it is said that appellee should have presented her claim against that estate within two years, which was not done. The argument is that if appellant is called on to pay any part of the deficiency his right to contribution against Tollakson's estate will be defeated; whereas, it is said, appellant could not himself have maintained a claim on a con-

tingent liability against the estate. Hence, it is contended, the failure of appellee to file her claim in the Probate Court against the estate of Tollakson has released appellant from all liability on the notes.

The true position of appellant and Carson is stated in Fish v. Glover, 154 Ill. 86–91, where, after stating that as between the mortgagor and the grantee of the mortgaged property who assumes the mortgaged debt, the latter becomes the principal debtor, it is said: "But this is only true as between the grantee of the mortgagor assuming the mortgage debt and the mortgagor himself. As between them, the mortgaged property becomes the primary fund. But the mortgagee may treat both as principal debtors and may have a personal decree against both, unless he has consented to accept such grantee of the mortgagor as the principal debtor, and to hold the mortgagor as surety merely." In the case at bar, the liability of appellant and Tollakson was joint and several. The decree provides that in the event of a deficiency "the complainant may apply to this court for decree or decrees against the defendants, Nels Arneson and Oliver M. Carson, who are each personally liable for payment of the amount herein above found due to complainant, and that execution may issue upon such deficiency decree or decrees." It is of course manifest that there is not as yet any such deficiency decree against appellant, and there is no certainty that there ever will be. If no such decree is ever entered—and there will not be if there should be no deficiency—the question whether the failure of appellee to file her claim against the Tollakson estate has forever released and discharged appellant from liability upon the joint and several notes made by Tollakson and appellant will never arise. It might very well, therefore, be treated as of no consequence whether the recital that appellant and Carson are each personally liable is erroneous or not, inasmuch as appellant is not as yet prejudiced thereby. It may be said, however, that if it be assumed that there are no further assets to be hereafter inventoried in which appellant might share to the

extent of any liability to him of that estate, nevertheless the release of the estate arises by operation of law; and as said in Parsons on Contracts (8th Ed., p. 29), "No release by the party injured, or claimant, has the effect of discharging all, although given but to one, unless it be a voluntary release; for if one of two who owe jointly either a debt or compensation for a wrong be discharged by operation of law without the concurrence or consent of the party to whom the debt or compensation is due, he does not thereby lose his right to enforce this claim against those not discharged." See, also, Bishop on Contracts, Sec. 871. The People v. White, 11 Ill. 342–348. This is in accord with principles of equity. In the case before us, it appears that Tollakson died while Carson, the grantee of the equity, was paying the interest, and there was no occasion to suppose that he would not continue to do so and pay the principal as well. The notes did not become due until nearly a year and a half after the death of Tollakson. The liability was joint and several, and it does not appear that appellant himself took any measure to keep alive a claim for a contribution against the estate. As before stated, it was not then and is not now certain that there will be any deficiency." If, however, there should be, appellant could be held primarily liable. Cummings v. The People, 50 Ill. 132. "If one of the joint obligors be dead, it is not necessary to notice him in the declaration, nor need the survivors be declared against as such, but they may be sued as if they alone were primarily liable." See, also, Stevens v. Catlin, 152 Ill. 56.

Finding no error in the record the judgment is affirmed.

Illinois Steel Company v. Felix McNulty.

1. WITNESSES—*Should be Permitted to Testify to the Facts Only.*—Witnesses should be permitted to testify to the facts only, and not to any conclusion that they may deduce from these facts, except in the case of experts, where the jury can not be presumed to have the same opportunity to form a correct conclusion as the expert witness.

2. NEGLIGENCE—*Servant Assuming Obvious Dangers.*—Where a servant places himself in an obviously dangerous position, or in a position which in the exercise of reasonable care for his own safety would have been obviously and plainly dangerous to him, then it is negligence on his part to have placed himself there.

3. INSTRUCTIONS—*Plaintiff Adopting an Extra Hazardous Method.*—An instruction that if the plaintiff took hold of a rail, the place of danger, instead of taking hold of some other object, if he could have done so with safety to himself, then voluntarily selecting a way known by him to be dangerous is negligence on his part, is proper. A party has no right knowingly to put himself in a place of danger which he could have avoided, and in such case, although he exercised every conceivable care in so doing, his injury would result from his voluntary act.

4. MASTER AND SERVANT—*Servant Wantonly Selecting the More Hazardous of Two Methods.*—Where an employe has the power to adopt his own methods of doing work, and he, wantonly, knowing and appreciating the dangers of both, selects of the two ways the more dangerous, he does so at his peril and can not recover for any injury resulting from such relation.

5. PLEADING—*It is Not Necessary to Charge in Specific Terms a Duty.*—Under the rules of pleading it is not necessary to charge in specific terms a duty, but if facts are averred out of which the duty springs, the declaration is sufficient. An averment that certain conduct is the duty of defendant is of no avail where facts are not stated from which the law will create the duty.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. MARCUS KAVANAGH, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Reversed and remanded. Opinion filed January 30, 1903.

Statement.—The declaration avers that on the fifteenth day of May, A. D. 1899, Felix McNulty was in the employment of the defendant, Illinois Steel Company; that he was directed by the defendant to work at the painting of certain pipes and structures in its factory, which said pipes and structures were in close proximity to certain railroad rails situated at a high distance from the ground; that a crane operated by steam power at times was run along and upon said railroad rails; that the crane was not running upon said rails at the time the plaintiff was ordered to work in proximity to them, nor had it been running upon them that day for some hours prior to the accident; but while the plaintiff was then and there rightfully and with due care for his own safety working under the said orders of

the defendant at the painting of said iron pipes, said defendant, without any notice or warning to plaintiff of their intention to start up or run the said crane upon the said railroad rails situated in close proximity to the plaintiff as aforesaid (and of the starting up or running of said crane the plaintiff was wholly unaware), the defendant then and there suddenly and with great force negligently started up and propelled the said crane without giving to the plaintiff any reasonable warning of the starting up or the approach thereof toward the plaintiff, and thereby the crane was then and there violently propelled against, over upon the body and arm of the plaintiff, and thereby certain fingers of plaintiff's hand were run over and crushed and mangled and the hand and arm of the plaintiff were thereby destroyed and as a consequence thereof amputated, and divers other injuries were inflicted, to the damage of the plaintiff of $20,000.

Plea of general issue was filed, and a trial had, resulting in a verdict in the sum of $10,000.

The mill where plaintiff was hurt was about eighty-five feet in width and extended north and south over 300 feet. Along the west wall and elevated some sixteen or eighteen feet from the ground was an iron girder supported on posts. On top of this girder was an ordinary "T" rail. On the east side of the mill was a girder supporting a railroad rail in the same form. The crane was of a girder construction and extended across the mill from one side to the other and rested upon wheels which ran along the railroad tracks and moved north and south. There is a large steam pipe eighteen inches in diameter running along the west track about three feet from and a little below and east of the girder. There are three other pipes alongside of these girders, four, five, and one inch in diameter. The four-inch pipe is eight inches below the top of the girder and the five-inch pipe is about eighteen inches below the top of the girder.

KEMPER K. KNAPP, attorney for appellant.

THEODORE G. CASE and JOHN T. MURRAY, attorneys for appellee; A. W. BROWNE, of counsel.

MR. JUSTICE BURKE delivered the opinion of the court.

Felix McNulty, appellee, recovered in the Superior Court for the loss of his left hand the sum of $10,000. The day before the accident in question occurred, the foreman of the mill ordered McNulty to paint the said two water-pipes, four and five inches in diameter, but gave him no specific directions with reference thereto. He began to paint the pipe at ten o'clock in the forenoon of the day before the accident. It appears that he had spent about sixteen weeks on two former occasions in painting the walls of the mill, and the third time, when he was hurt, he had been at work painting about two weeks. The steam-pipe did not extend so far south as did the girder and other water-pipes. He began to paint at the south end and reached the pipes by using a ladder, and so continued until he came to the steam-pipe, when it appears that it was inconvenient to reach the water-pipes from the ladder, and in order to paint them he climbed from his ladder to the steam-pipe, and, resting or lying thereon, he proceeded to paint the water-pipes. While so engaged, and to prevent losing his equilibrium in reaching said pipes, he grasped the iron rail or track, and the crane, moving from the south, ran over and crushed his fingers.

On behalf of McNulty it is claimed that he was ordered to paint these pipes, and that owing to their location it was impossible to carry out the order and paint them without placing his hand on the rail, and that the crane had not moved on the morning of the accident, and that prior to the accident he had received no notice that the crane was to be moved.

On the other hand it is insisted on behalf of the company that McNulty had worked many months in the mill, was familiar with the work of the mill, and especially with the movement of the crane, because he himself had worked with it much of the time while in the "sailor gang," and that he was not directed to place his hand on the rail, but was given the general order only to paint the pipes. McNulty was asked the question why he put his hand on the rail and he

was permitted to answer that he had no other place to put it, to which answer exception was properly preserved. If his answer stated the fact that he was ordered to paint the pipe, the performance of which would of necessity require him to put his hand in the place of danger, on the rail, it must be conceded that was a very material fact, and if the jury accepted his statement it doubtless had great weight in determining their verdict.

We are of the opinion that the court committed error in permitting McNulty to say that there was no other place for his hand. If it was true, it was for the jury to find from proper evidence. Witnesses should be permitted to testify to the facts only, and not to any conclusion that they may deduce from these facts, except in the case of experts, where the jury can not be presumed to have the same opportunity to form a correct conclusion as the expert witness. Brink's City Express Co. v. Kinnare, 168 Ill. 643; Hoehn v. C., P. & St. L. Ry. Co., 152 Ill. 223.

The record does not disclose why McNulty might not have painted the pipes from the north toward the south, and, if necessary to secure himself from falling, he could have grasped the ladder resting against the pipe with his left hand and had his right hand free to use the brush; furthermore, it does not appear from the evidence that, with the weight of his body on the westerly part of the steam-pipe, why he could not have placed his left hand against the girder below the rail. The girder, as to its width and projections, has not been described, but in this entire branch of the case the jury are compelled to accept the conclusion of the witness that he was exercising ordinary care at the time of the accident by resting his hand on the only place where he could rest it. The evidence on this point was material for the plaintiff, because it was necessary for him affirmatively to prove that he was in the exercise of ordinary and reasonable care for his own safety. If the only logical conclusion from the evidence were that there was no other place for his hand except on the rail, then the statement, though improper, could not have been an element in determining the verdict.

It appears that the mill, at all hours of the day, was very noisy, rendering it extremely difficult to carry on conversation within it, and that a code of signals to operate the mill was adopted, consisting of the blowing of whistles. There were eight different steam whistles in the mill. Two toots of one of them started the mill, one stopped it, three called the machinist, four the crane-man, five the master mechanic, and a sharp, prolonged whistle the "sailor gang," and several "toots" were to keep the mill going faster.

McNulty had worked in the mill a long period of time and was familiar with its operation. He knew that the crane moved in response to four whistles. He was given the general order to paint the pipes, but not directed where to begin or how to proceed in the work, but the details were all left to his own judgment. If the danger of placing his hand upon the rail was obvious and well known to him, or if in the exercise of reasonable care for his own safety the danger would have been obvious and plain to him, then it was negligence on his part to have placed his hand upon the rail. Consolidated Coal Co. v. Haenni, 146 Ill. 614; North Chicago St. R. R. Co. v. Conway, 76 Ill. App. 621.

It is contended, however, that the foreman knew that McNulty could not paint the pipes without placing his hand upon the rail or ought to have known it, and inasmuch as he gave the order to go into the known place of danger, it was his duty to have protected McNulty by notifying him of the approach of the crane, and failing so to do he was negligent. Again it may be answered that there is no evidence in the record tending to show that it was necessary that McNulty place his hand upon the rail to do the painting and that the evidence shows that McNulty, for many months, had been perfectly familiar with the method of moving the crane, and that the danger of placing his hand on the rail was as plain and well known to him as to defendant's foreman, and that the record does not show that McNulty notified the foreman or the crane-man how he would proceed with his work, and that there is no evidence that it was known to the foreman or crane-man that McNulty had put his hand in a place of danger.

There is a conflict in the evidence as to whether the signal of four whistles was given for the starting of the crane. McNulty says that no signal was given, and other witnesses that they did not hear it; but the crane-man and the foreman both testified that the signal was given; the foreman that he gave it and the crane-man that he was thereby called to operate the crane.

This branch of the case was strictly for the jury, but in view of an entire absence in the record of any evidence tending to show that McNulty was not negligent in selecting under his general order the particular mode in which the business should be done, we think that the court committed error which must result in a reversal of this case in marking refused the following instruction:

"The jury are instructed that if they believe from the evidence that the plaintiff took hold of the rail upon which the crane ran, and that when he did so he knew that the crane, at irregular intervals, ran along upon this rail, and that he could have taken hold of, or rested his hand on the girder which supported said rail, or on the water-pipes, or other parts of the structure there, instead of taking hold of said rail, and could thereby have supported himself so that he could have done the painting which he was doing, in safety, and that to take hold of said rail was a dangerous way of doing said work, and that to take hold of or rest his hand upon the girder which supported said rail, or the water-pipes or other parts of the structure there, was a safe way of doing said work, and that the plaintiff voluntarily selected a way which he knew was a dangerous way instead of a way which he knew was a safe way of doing said work, then the jury should find the defendant not guilty."

It is true we hold that there is no legal evidence in the record that the rail was the only place for McNulty's hand, but he was allowed to say that the rail was the only safe place; and the jury should have been told, as stated in this instruction, that if the plaintiff took hold of the rail, the place of danger, instead of taking hold of some other object, if he could have done so with safety to himself, then voluntarily selecting a way known by him to be dangerous was negligence on his part.

While this instruction may be subject to some minor

criticisms, still, under the circumstances of this case it should have been given, and then the error above pointed out might not have been so serious. The party has no right knowingly to put himself in a place of danger which he could have avoided, and in such case, although he exercised every conceivable care in so doing, his injury would result from his voluntary act. Armour v. Brazeau, 191 Ill. 126; Howe v. Medaris, 183 Ill. 288.

It is a general principle applicable to cases of this kind that where an employe has the power to adopt his own methods of doing work, and he wantonly, knowing and appreciating the dangers of both, selects of the two ways the more dangerous, he does so at his peril, and can not recover for any injury resulting from such relation. Star Elevator Co. v. Carlson, 69 Ill. App. 212; Wabash R. R. Co. v. Propst, 92 Ill. App. 485.

In view of the error committed in receiving improper evidence and in failing properly to instruct the jury on a decisive point in the case we shall not extend this opinion by comment upon other instructions given and refused.

Appellant urges with much earnestness that the declaration in this case fails to state a cause of action. The court overruled defendant's motion in arrest of judgment. Counsel for appellant claims that the declaration does not show that the company owed to McNulty the duty not to move the crane without warning him. Under the rules of pleading it is not necessary to charge in specific terms a duty, but if facts are averred out of which the duty springs the declaration is sufficient. An averment that certain conduct is the duty of defendant is of no avail where facts are not stated from which the law will create the duty. C. & A. R. R. Co. v. Clausen, 173 Ill. 105; Ayers v. City, 111 Ill. 412.

But are not sufficient facts stated in this declaration from which the law will imply the duty on the part of defendant to have warned McNulty of the approach of the crane? It is averred in the declaration that McNulty, an employe of the defendant, was ordered to paint certain pipes in close proximity to the rail upon which the crane moved. The

word proximity means "nearness in place," and so far as appears from the declaration the pipes may have been below or above the track, and so located that it would be impossible for a workman to paint while the crane was in the act of passing; that the crane would strike him and throw him upon the track as it passed the place where he was at work.

As it was the legal duty of the defendant company to furnish a place reasonably safe in which McNulty might execute its said commands, it would follow that sufficient facts are pleaded from which the said duty of the defendant would be implied. If the defendant knew that the plaintiff was in a situation, or liable to be in a situation, in which he would be hurt if the crane was moved without warning, then the defendant owed him the duty to warn him, and if the painting could not be done without a danger unknown to the plaintiff, it certainly was the duty of the defendant to have notified him. It should be conceded that the declaration is unskillfully drawn, and that the immediate facts should have been specifically averred from which the duty to warn would directly arise; but as the defendant did not demur, but submitted the case to a jury, any defect in the statement is waived after verdict. We regard the declaration as defectively stating a good cause of action. Under the rule laid down by the Supreme Court a verdict will aid a defective statement of a cause of action, but will never assist a statement of a defective cause of action. C. & A. R. R. Co. v. Clausen, *supra.*

The majority of this court are of the opinion that the declaration and the issue joined upon it did fairly impose the duty on the plaintiff to prove the facts from which the duty arose to warn the plaintiff of danger. While the averment of the declaration as to the proximity of the pipes, and of the plaintiff to the railroad rail, may be so construed as to be held ambiguous, still the averments of the declaration, with all their legal intendments after verdict, in our opinion, state a good cause of action.

Because of the errors pointed out in this opinion, the judgment must be reversed. The judgment of the Superior Court is reversed and remanded.

MR. JUSTICE FREEMAN: I concur in the result, but do not regard the declaration as stating a cause of action. It sets forth, in substance, that appellee was directed to paint certain pipes and structures which "were in close proximity to certain railroad rails situated at a high distance from the ground." He was injured by putting his hand on one of these rails, and allowing it to remain until the wheels of a traveling crane passed over it. According to the declaration the pipes which he was painting were in close proximity to the rails, but no facts are stated which imply that doing this work necessarily brought appellee himself into any place of danger. It is afterward stated in the declaration, by way of recital, that "at the time the plaintiff was ordered and directed to work in proximity to said rails," the crane was not running on the rails, and had not been for some hours. This language assumes what is not averred at all—that he was ordered to work in proximity to the rails. It is evident that an order to paint pipes in proximity to the rails does not necessarily imply an order to place himself in such proximity. But if we assume that it does, violent though the assumption may be, the fact that a man is in proximity to a danger is entirely consistent with his being in a place of absolute safety, where, if he remained, no harm could come to him, and where his employer and fellow-employes might reasonably expect him to remain. In such case no duty to warn appellee of a perfectly plain danger not far away can be implied. The averment that he was run over upon a railway near by implies that he must have left his place of safety "in proximity" to that railway, and of his own volition, so far as appears, put himself in a place of danger on the railway itself, in a place where he had no business to be. For injuries so incurred no responsibility rested upon the master. The facts stated do not show negligence on the part of the appellant. No duty is averred; and no breach of duty shown. Nothing in the declaration stated avers or implies any failure on the part of the master to exercise reasonable diligence in furnishing appellee a reasonably

safe place where, and reasonably safe appliance with which to do his work. In my opinion the declaration completely fails to state a cause of action, and I may add that the evidence fails, in my judgment, to show a state of facts from which the defects in the declaration could be cured.

---

105 604
a204s 228

Lincoln Park Chapter No. 177, Royal Arch Masons, v. Matthew J. Swatek et al.

1. CORPORATIONS—*Can Not Be Deprived of Property Without a Hearing.*—A court has no jurisdiction to deprive a company of its property and dissolve it when the company is not present to defend itself. All bodies should be allowed the privilege of being present at their own dissolution.

2. SAME—*What Must Be Shown to Establish a Corporation De Facto.*—Two things are necessary to be shown to establish a corporation *de facto*, viz: 1. The existence of a charter or some law under which a corporation with the powers assumed might be lawfully created. 2. A user by the party to the suit of the rights claimed to be conferred by such charter or law. If the law exists and the record exhibits a *bona fide* attempt to organize under it, very slight evidence of user beyond this is all that can be required.

3. SAME—*For What Purpose They May Be Formed.*—Corporations may be formed for pecuniary profit under our general act, "for any lawful purpose except banking, insurance, real estate brokerage, the operation of railroads and the business of loaning money."

4. SAME—*How the Question of Legal Organization May Be Determined.*—Whether a company which claims to be incorporated has been legally organized, may be ascertained by *scire facias* or an information in the nature of a quo warranto at law. The legal existence of a corporation can not usually be inquired into collaterally, where there has been a *bona fide* attempt to create a corporation and an exercise of corporate powers, especially by parties who have dealt with the corporation as such.

Bill for the Dissolution of a Partnership.—Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Affirmed. Opinion filed January 30, 1903.

Statement.—This is a bill in equity filed by Lincoln Park Chapter No. 177, Royal Arch Masons, against Matthew J.

Swatek and over sixty other parties, who, it is claimed, were pretended stockholders in a concern known as North End Masonic Temple Association.

The bill was filed for a dissoluton of this concern as a partnership, for the partition of its real estate and a division of its property among its members. A general demurrer was sustained by the Circuit Court and the bill dismissed for want of equity. The complainant appeals.

The bill as amended, sets forth *inter alia*, that on November 6, 1892, appellee Matthew J. Swatek was the owner of certain premises described in the bill of complaint; that on that date he acquired title to another piece of land immediately south; that the two together have a frontage of fifty-five (55) feet, and are known as 615 and 617 North Clark street, Chicago; that complainant is a fraternal organization having for its object the working and conferring of the degrees in Royal Arch Masonry, an ancient secret order in the State of Illinois, of which appellee Swatek and divers friends and acquaintances were members; that complainant was possessed of over $3,000 in cash and securities; that appellees conspired together and conceived the idea of inducing the said complainant, and various members of the Masonic Fraternity, to invest their money in a building which they proposed to erect upon the said premises; that for the purpose of obtaining possession of the moneys belonging to said complainant, said appellees on April 17, 1893, organized a pretended corporation under the name of the North End Masonic Temple Association, pretended to be formed under the laws of the State of Illinois; that it was stated in the statement made for obtaining the license for opening books of subscription to the capital stock of such corporation; that "the object for which it is formed is to encourage social and fraternal relations among its members, and to promote and inculcate the principles of masonry as sought in the different masonic bodies, and to provide suitable and permanent accommodations for same by the erection of such a building as will provide halls, a library, reading rooms, and such other conveniences as are requisite therefor."

It is alleged that the objects stated as the purposes of such corporation were clearly not the objects of a corporation for pecuniary profit; that a certificate was issued by the secretary of state of the State of Illinois of the organization of such corporation, and that the same was afterward, on September 6, 1893, recorded in Cook county, Illinois; that as a part and parcel of the scheme, program and conspiracy of the said Swatek and associates to obtain possession of the moneys belonging to the complainant, they caused to be executed a pretended lease of all the premises above described by said Matthew J. Swatek and Mary L. Swatek, his wife, to the so-called North End Masonic Temple Association, for the term of ninety-nine years, which provides for the payment of ground rent to Matthew J. Swatek of nineteen hundred and eighty dollars ($1,980) per year or six per cent upon a valuation of thirty-three thousand dollars ($33,000); that said premises were not worth to exceed sixteen thousand five hundred dollars ($16,500); that after the organization of said so-called corporation, said appellees and their friends and associates, at a meeting at which less than one-eighth of the members of the complainant were present and without notice to other members, induced the complainant to invest in the stock of said so-called proposed corporation the sum of three thousand dollars ($3,000); that immediately thereafter said appellants proceeded with the erection of a building upon the premises above described, the rear part of which building was arranged with a lodge hall, dining room, parlors and dance hall, and the front part of which consisted of two stores with two flats or living apartments above each store; and that on or about the 30th day of April, 1894, the said building was completed and ready for occupancy; that said pretended corporation has, since the completion of said building, rented out the various halls, stores and flats or apartments to different bodies and individuals, and has never carried on any business whatever except the renting of said apartments and the management of said building; that said pretended corporation has never since its pre-

tended organization encouraged social and fraternal relations among its members, and has never promoted and inculcated the principles of masonry as sought in the different masonic bodies; that the entire control and management of said corporation has been confined to Matthew J. Swatek and those working in his individual interest, in connection with the management, repair and collection of the rents of said building; that said pretended corporation was organized under the general incorporation law for corporations for pecuniary profit; that said corporation is invalid for the reason that the State of Illinois does not allow or permit the organization of a corporation for the purposes set forth in the charter of said pretended corporation, or for carrying on of the business which the said pretended corporation has in fact carried on since its pretended organization.

It is further set forth that by reason of the fact that said corporation has never had any legal existence, the complainant and the parties above named who pretend to be stockholders in said pretended corporation are owners of the premises above described in shares, in proportion to the amount of money which they have invested in the said corporation and in the building and improvements on said premises; that all the acts of said pretended corporation are void; that all of the parties above named and the complainant are tenants in common of the said premises and the buildings and improvements thereon, in proportion to the value of the land, and the amount of money contributed by them respectively, to the erection of said building; that complainant is the owner of three hundred and ten shares of the capital stock of said pretended corporation and has invested in said premises the sum of three thousand one hundred dollars ($3,100); that it is very much dissatisfied with the conduct of said business and the management of said property, and that it is desirous of having said business wound up and a division of the property made between the parties respectively interested therein.

The bill prays for a winding up and dissolution of the

copartnership, the appointment of a receiver and a partition and division of the property. The question is presented whether the complainant is entitled to any relief in a court of equity, the demurrer admitting the facts well pleaded.

FRED H. ATWOOD, FRANK B. PEASE and CHARLES O. LOUCKS, attorneys for appellant; GEORGE M. STEVENS, of counsel.

ARNOLD TRIPP, attorney for appellees.

MR. JUSTICE FREEMAN delivered the opinion of the court.

The contention of appellant in this case is that the purpose for which the North End Masonic Temple Association was organized according to its charter, was not one for which the statute authorizes the organization of corporations for pecuniary profit; that its real purpose was to deal in real estate; that it does not carry on nor pretend to carry on the alleged purpose for which it was incorporated; and that therefore its charter is void and its stockholders are copartners and liable as such. The argument is stated as follows in appellant's brief: "We submit that the North End Masonic Temple Association, being absolutely void as a corporation, never had a legal existence as such, and the stockholders and those participating in its organization became and are nothing but copartners, and the business transacted by them since the attempted organization of said association is merely the business transactions of a copartnership." It is insisted, therefore, that the demurrer should have been overruled and the defendants required to answer.

The alleged corporation is not made a party to the bill. It is regularly organized under the statute, and the legal formalities have apparently been fully complied with. It is sought by this bill to treat it as non-existent, and to deprive the corporation of any control over the property which it holds, at least by legal title, whether such title was improperly acquired and is improperly held or not. What is said in Baker v. Backus, 32 Ill. 79–80, is in point under

these circumstances: "The court had no jurisdiction to deprive the company of its property, and dissolve it when the company was not present to defend itself. All bodies should be allowed the privilege of being present at their own dissolution."

It is argued, however, that this is not even a *de facto* corporation. The argument is that there is no law authorizing the formation of a corporation for pecuniary profit for the purposes mentioned and hence no corporation *de facto*, because of no authority in law to exercise the powers claimed.

In Eaton v. Walker, 76 Mich. 579–585, it is said: "Two things are necessary to be shown to establish a corporation *de facto*, viz.: (1) The existence of a charter or some law under which a corporation with the powers assumed might be lawfully created. (2) A user by the party to the suit of the rights claimed to be conferred by such charter or law. If the law exists and the record exhibits a *bona fide* attempt to organize under it, very slight evidence of user beyond this is all that can be required." See also, Hudson v. Green Hill Seminary, 113 Ill. 618–626. In the case before us appellant has been a stockholder for some years and has received money paid as a dividend and recognized the corporation in other ways and has participated in the alleged illegal combination. Coquard v. Nat. Lin. Oil Co., 171 Ill. 480–484. Corporations may be formed under our general act for pecuniary profit, "for any lawful purpose except banking, insurance, real estate brokerage, the operation of railroads and the business of loaning money" (R. S., Chap. 32, Sec. 1), and for "any lawful purpose other than for pecuniary profit," in the manner provided in section 29 of the same chapter. These corporations may be capable of holding real and personal estate, and may sue and be sued. The corporation in question appears to be regularly organized in conformity with the statute and its purpose as stated is not unlawful. Whether it has exceeded its corporate powers in issuing stock or is exercising them in violation of its charter, has no bearing upon the question of its corporate existence. Appellant's contention

that the law does not authorize the formation of a corporation for pecuniary profit for the purposes specified, may be ground for intervention by the state. "It is against the policy of this state to allow corporations to hold real estate beyond what is necessary for the transaction of the business or specific corporate purposes of such corporations." First M. E. Church v. Dixon, 178 Ill. 260–271; Nat. Home Building Association v. Bank, 181 Ill. 35–42; The People v. Pullman Car Co., 175 Ill. 125–143. Whether the purposes for which this corporation is formed reasonably require it to hold the real estate it has in order to carry out the objects of its creation is not before us as the case stands. In the case of Baker v. The Administrator of Backus, 32 Ill. 79, 111, there was as here a "body corporate *de facto*. It had been doing business more than a year under the charter, had an office in the city of Chicago, had all the necessary officers through whom the business was transacted, and much money and important interests were involved in their undertaking." It was concluded that whether the company had ever been legally organized as a corporation and existed as such, "could be ascertained in no other way than by a direct proceeding at law," and furnished no ground for the interposition of a court of equity. Whether a company which claims to be incorporated has been legally organized may be ascertained by *scire facias* or an information in the nature of a quo warranto at law. There is no ground for chancery interposition, where there is a corporation *de facto*. Stockholders of a corporation fully incorporated under the statute are not considered partners even as between themselves. The legal existence of a corporation can not usually be inquired into collaterally, where there has been a *bona fide* attempt to create a corporation and an exercise of corporate powers, especially by parties who have dealt with the corporation as such. "Only the state can complain of injury to the public or that public rights are being interfered with, and enforce a forfeiture of defendant's franchises for that reason." Coquard v. Nat. Linseed Oil Co., 171 Ill. 480–484 (*supra*).

The judgment of the Circuit Court must be affirmed.

Catharine McAnaney v. Bernard Quigley, for the use, etc.

1. GARNISHMENT—*Chap. 62, Sec. 4, R. S.*—The statute provides that the person for whose use a garnishee summons is issued shall advance through the constable to the person summoned as garnishee, $1, and in addition five cents per mile for each and every mile of necessary travel to and from the office of the justice of the peace, and the constable making such service shall show by his return the fact of the payment of such fee and mileage.

2. SAME—*When Person Summoned as a Garnishee Fails to Appear.*—Chap. 62, R. S., provides that "when any person shall have been summoned as a garnishee by any justice of the peace and shall fail to appear, the justice of the peace may enter a conditional judgment against such garnishee for the amount of the plaintiff's demand, and thereupon a scire facias shall issue against such garnishee returnable within the same time as other summonses from justices of the peace, commanding such garnishee to show cause why such judgment should not be made final. If such garnishee, being served with process or notified as required by law, shall fail to appear, the justice of the peace shall confirm such judgment, to the amount of the judgment against the original defendant, and award execution for the same and costs.

3. CERTIORARI—*Officer's Return as to Service is Conclusive.*—Where the return of the officer as to service is regular, it is conclusive in certiorari, and the defendant can not excuse a failure to appeal on the ground that the summons was not in fact regularly served.

Garnishment.—Appeal from the Circuit Court of Cook County; the Hon. ALONZO K. VICKERS, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Affirmed. Opinion filed January 30, 1903. Rehearing denied February 18, 1903.

Statement.—December 28, 1898, Thomas Haran brought a suit to charge the petitioner as garnishee of one Bernard Quigley, before J. C. Martin, a justice of the peace of Cook county.

The petition filed in this case for a writ of certiorari represents that a summons was issued against petitioner as garnishee and returned December 30, 1898, and served by reading to and tendering her $1.10 which was refused; that January 3, 1899, the call was continued to January 6, 1899, 1 P. M., when a conditional judgment against the garnishee for $200 was entered and case continued as to garnishee till January 13, 1899, when was ordered the writ of scire

facias and marked "returned, December 30, 1898," served by reading to said Kate M. Ananey; January 23, 1899, case called, petitioner not present; a final judgment was rendered against her.

The petition further represents that petitioner is seventy-seven years of age, feeble, able to read printing somewhat, but not writing; did not know the importance of a summons; tha t said Bernard Quigley, her nephew, died January 13, 1899, and Dehlia Quigley, her niece, died on January 23, 1899, by which misfortune the petitioner was greatly affected; that the constable never tendered to the petitioner $1.10 as returned by him; that if the writ of scire facias was served on her it was at her residence, over two miles from the office of said justice of the peace; that the petitioner is wholly ignorant of the law of this state and that she did not know at the time of the rendition of the judgment aforesaid that a judgment might or could be rendered against her, or that appeals must be perfected within twenty days thereafter, and did not know that a judgment had been rendered against her until more than twenty days thereafter; that on the 20th day of January, 1899, at the grave of said Bernard Quigley, petitioner met said Thomas Haran and said to him, "I hope there will be no more trouble about that bill you claim he (meaning Bernard Quigley) owes you," and the said Thomas Haran replied: "Mrs. McAnaney, don't you worry about that. It will be all right." Petitioner denies any indebtedness to said Bernard Quigley and prays for a writ of certiorari to remove said cause from said justice of the peace into the Circuit Court of Cook County.

ROBERT F. KOLB and DAVID P. O'LEARY, attorneys for appellant.

M. EMMET CLARE, attorney for appellee.

MR. JUSTICE BURKE delivered the opinion of the court.

On motion of plaintiff's attorney, based upon the petition in this case, the writ of certiorari was quashed and appeal dismissed. This action of the court is assigned as error.

The statute provides that the person for whose use a garnishee summons is issued shall advance through the constable to the person summoned as garnishee $1, and in addition five cents per mile for each and every mile of necessary travel to and from the office of the justice of the peace, and the constable making such service shall show by his return the fact of the payment of such fee and mileage. R. S., Chap. 62, Sec. 4.

The petition alleges that petitioner was served at her residence, if served at all, two miles distant from the office of the justice of the peace, and was entitled to receive twenty cents for mileage, but only ten cents were tendered her.

It is argued that inasmuch as she failed to appear and was not tendered sufficient mileage fee, the justice of the peace was without jurisdiction to proceed. The petitioner is in doubt as to whether the original summons or writ of scire facias was served upon her, but under the facts of this case the return of the officer must be treated as absolutely true. The case of Fitzgerald v. Kimball, 86 Ill. 396, is an authority directly in point, that such an attack as is attempted in the case at bar can not be made in a petition for an appeal by certiorari. Harding v. Peale Co., 44 Ill. App. 344; Wehner v. Wehner, 77 Ill. App. 116.

The return of the officer indorsed upon the original summons is regular. The petitioner did not refuse to accept the money because the mileage fee tendered was not sufficient and it can not be seriously claimed that if by measurement of the distance from the office of the justice of the peace to her home it is found that the officer was mistaken in computing the distance and therefore did not tender an amount entirely sufficient for mileage to and from petitioner's residence, that therefore the court was without jurisdiction.

However, the statute fully protects the interests of a garnishee in a case similar to the one at bar in the following provisions: "When any person shall have been summoned as a garnishee by any justice of the peace and shall

fail to appear, the justice of the peace may enter a conditional judgment against such garnishee for the amount of the plaintiff's demand, and thereupon a scire facias shall issue against such garnishee returnable within the same time as other summonses from justices of the peace, commanding such garnishee to show cause why such judgment should not be made final. If such garnishee, being served with process or notified as required by law, shall fail to appear, the justices of the peace shall confirm such judgment, to the amount of the judgment against the original defendant, and award execution for the same, and costs." R. S., Ch. 62, *supra*.

The writ of scire facias was issued on the thirteenth day of January, 1899, and returned, evidently by mistake, marked December 30, 1898, but the return was subsequently amended, as was legal and proper, to read in accordance with the fact, "January 18, 1899." The petitioner was served with the summons of scire facias and thereby notified that a conditional judgment had been entered against her in this case and commanding her to appear and to show cause, if any she had, why such judgment should not be made final. If she felt aggrieved because sufficient mileage fee had not been tendered her, through this provision of the statute and the service of the writ of scire facias upon her she was given an opportunity to appear before the justice of the peace and show that the statute had not been complied with and therefore that conditional judgment ought not to be made final. She neglected to avail herself of her rights under the statute and must endure the consequences. Counsel for appellant suggest that the petitioner was a lady advanced in years, oppressed by the death of relatives, ignorant of the law, and some days before the final judgment was lulled into inaction by the alleged statement of the judgment creditor that his claim would be all right. None of these matters as alleged in the petition are decisive of this case. It is to be observed that petitioner claims that she spoke to the judgment creditor about his claim and yet states in her petition that she does not think that she

was served by the constable with either the original summons or scire facias. Her negligence is fatal to her petition. The certiorari in this case was properly dismissed. The petition shows no reason why an appeal properly could not have been taken. Doan v. Sibbit, 61 Ill. 486.

The judgment of the Circuit Court is affirmed.

Herman E. Dick v. John Zimmerman.

105 615
a207s 686

1. PRACTICE—*It is the Peculiar Province of the Jury to Determine the Preponderance and Credibility of the Evidence.*—Where there is a clear conflict in the evidence, it is the peculiar province of the jury to determine the preponderance and credibility of the evidence.

2. APPELLATE COURT PRACTICE—*Right of Prevailing Party Where Court is Asked to Set Aside a Verdict.*—When the Appellate Court is asked to set aside a verdict, the prevailing party is entitled to all the favorable inferences legitimately arising from the evidence.

3. ACCOUNT STATED—*Sent to Defendant in the Usual and Customary Way—Presumption.*—When an account stated is sent by the plaintiff to the defendant in the usual and customary way, in the absence of evidence to the contrary, it is presumed that it was duly received.

Assumpsit.—Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge presiding. Heard in this court at the March term, 1902. Affirmed. Opinion filed January 26, 1903.

ZACH. HOFHEIMER, attorney for appellant.

DALE & FRANCIS, attorneys for appellee.

MR. PRESIDING JUSTICE BALL delivered the opinion of the court.

This is assumpsit by appellee against appellant in which a judgment was entered in favor of appellee for the sum of $1,420. The account grew out of the handling of certain foreign patents in which both parties were interested.

Appellee testified that in October, 1898, he presented to appellant an account showing the money due to him; that appellant examined it and said it was all right, and he intended to pay it; that appellee should make out a full

statement, with copies of bills paid, and bring it to him the following morning and he would then give appellee a check for the bill; that this was done, when appellant said he was disappointed in the amount of his bank account and could not settle with him then, but would send him a check from London within three weeks; and that appellant had never paid the bill.

Appellant testified that he never promised appellee to pay him any balance, and that when the bill was presented he disputed the items.

Here was a clear conflict in the evidence. When that is the case it is the peculiar province of the jury to determine the preponderance and credibility of the evidence. O'Brien v. Palmer, 49 Ill. 72. When an appellate court is asked to set aside a verdict, the prevailing party is entitled to all the favorable inferences legitimately arising from the evidence. Hess v. Rosenthal, 55 Ill. App. 324.

The appellee testified as to nothing but the interviews in October, 1898, with appellant, in which he presented the account stated, and to the sending and to the receiving of letters which were put in evidence. On cross-examination he was asked as to certain business transactions between him and appellant occurring in 1896 and 1897. Counsel for appellee objected, and the court sustained the objection, saying: "There is nothing to cross-examine him about except these interviews he has testified to and these letters." This ruling and this remark are severally assigned for error. The answer to the contention is twofold; first, the ruling was correct; the question asked did not relate to the examination in chief, and the statement of the court contains nothing more than the reason upon which the ruling was founded; and, second, counsel for appellant did not then except to either the ruling or to the remark of the court. By reason of such omission he is barred from raising the point upon appeal. Caveny v. Weiller, 90 Ill. 158.

Three letters written by appellee to appellant were put in evidence, over the objection of the latter. The first

letter is dated October 12, 1898. Two days thereafter appellant writes to appellee, saying: "I have yours of the twelfth with enclosures." Here is proof of the receipt of this letter. Hence its admission in evidence was not error. The third letter was written by appellee, properly addressed, and by him personally deposited in the mail. The objection to the introduction of this letter was not well taken. The second letter was written, signed and sent by appellee "in the ordinary course of business." The fact that the custom of others in regard to the sending of letters was shown, is immaterial, because it was also proven that it was mailed according to the custom of appellee. Notice was given appellant to produce these three letters. He did not do so. Although present at the trial, appellant did not deny the receipt of these letters, or of either of them. When an account stated is sent by the plaintiff to the defendant in the usual and customary way, in the absence of evidence to the contrary it is presumed that it was duly received. Darby v. Widow, etc., 28 La. Ann. 605. This second letter was nothing more than a demand for payment. Each of the other letters, properly in evidence, contained a like demand. So that if its admission was a technical error, it was not reversible error.

The court admitted in evidence the declaration, consisting of the common counts. Attached thereto was a copy of the account sued upon and plaintiff's affidavit of amount due. If appellant had excepted to the action of the court in admitting these papers, the question would be a serious one, but neither the abstract nor the record shows that an exception was taken thereto. It does not avail to raise this point for the first time upon appeal.

The evidence presented by appellee on the trial tended to prove an account stated. It was confined solely to that question. If there was no stating of an account, then appellee had no case. Appellee's evidence being thus limited, the prior transactions of the parties were not in issue, unless the account stated was attacked for fraud or mistake, in which case the burden shifted to appellant. Upon this

theory he put in evidence relating to the items upon which the account was based. The jury found, upon conflicting evidence, that there was an account stated, and that it was not based upon fraud or mistake, and we do not think such finding should be disturbed.

The judgment of the Circuit Court is affirmed.

Assets Realization Co. v. Joseph P. Wightman, Jr., et al.

1. CHANCERY PRACTICE—*Power of Trial Court upon Case Being Remanded.*—Under a remanding order the trial court has the power to enter an order re-referring the cause to the master to take further testimony. It also has the power to direct the master to consider all the testimony taken on the original reference, as well as that to be taken upon the re-reference, and to report his conclusions of law and of fact.

2. INTEREST—*Privilege of Exacting a Higher Rate than is Allowed by the General Statute Concerning Interest.*—The privilege of exacting a higher rate than is allowed by the general statute concerning interest is a special privilege which will not be granted, unless the proof affirmatively shows a strict compliance with the terms of the statute by which it is permitted.

3. MASTER—*When His Finding Will Not Be Disturbed.*—Unless the conclusion of the master is clearly against the weight of the evidence, this court can not disturb it.

4. USURY—*Loaning Funds of Building Association Without Complying with the Statute.*—Where a loan from a building association is not obtained by or granted upon competitive bidding according to the terms of the statute, the premium being privately fixed and agreed upon with the secretary of the association, and the total amount paid in premiums and interest for the use of the money loaned exceeds the legal rate of interest, the transaction is usurious.

Bill for Foreclosure.—Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge presiding. Heard in this court at the March term, 1902. Reversed. Opinion filed January 26, 1903.

March 17, 1890, appellee Wrightman made a loan from the Mechanics & Traders' Savings, Loan and Building Association for $2,100 on twenty-one shares of its stock at a premium of twenty per cent, with interest at eight per

cent per annum. The premium was deducted from the loan. He gave his note for $2,100 to evidence this indebtedness, and received but $1,680 in cash. This note provided for payment of the interest and dues on the stock in monthly installments. Upon the maturity of the stock the loan was to be canceled. To secure the payment of this loan one Edgar T. Paul and his wife executed a mortgage upon certain real estate, which Wightman was then about to purchase. The deal between Wightman and Paul was never carried out. Nearly two years after, Paul sold the real estate to appellee Morley for $2,750, without telling him of the existence of this incumbrance, and without deduction therefor. Morley paid to Paul a small amount in cash and gave his notes for the balance of the purchase price. When he made this conveyance Paul intended to pay off the association mortgage, and therefore said nothing to Morley about the incumbrance. Finding himself unable to do so, some two years later he told Morley the facts. This was the first knowledge Morley had of the existence of that incumbrance. The two men settled the matter by the surrender by Paul to Morley of the notes given by the latter on his purchase, and the taking up of the payment of the association loan by Morley, who thereafter made monthly payments, as provided in the loan, for nearly six years.

The association became insolvent, and by the Circuit Court of Cook County on December 22, 1897, was ordered to be wound up, and receivers were appointed. Up to that date there had been paid upon this loan for stock $955.50, and for interest $1,223. July 21, 1899, these receivers filed their bill of foreclosure against appellees, alleging the making and securing of the loan substantially as above stated, and that by reason of the insolvency of the association such loan became due. The bill contains the usual prayer for process and foreclosure.

By their answer Morley and wife set up the conveyance of the premises free from incumbrance from Paul to Morley and from the latter to his wife; that the contract between

the association and Wightman was usurious in this, that the loan was not offered in open meeting to the highest bidder, and that by reason thereof complainants are not entitled to recover either interest or premium on said loan, and all sums paid at any time to the association and to complainants upon this loan should be credited upon the principal indebtedness.

Wightman answers, in substance, as did Morley and wife, claiming also that the premium of $420 deducted by the association from the loan of $2,100 was a fixed minimum premium established by the association, the fixing of which was unlawful and fraudulent; that the funds of the association were never offered at a meeting of the board to the highest bidder, and he never bid a premium of $420 or any other premium; that upon the $2,100 loan he received but $1,680, while the association compelled him to pay eight per cent upon the entire loan, which was usurious and unlawful.

The cause was heard upon the report of the master and a decree of foreclosure was entered finding that there was still due upon the mortgage indebtedness the sum of $1,577.01. Upon appeal to this court the decree was reversed and the cause remanded for further proceedings in conformity with the opinion. Wightman v. Suddard, 93 Ill. App. 142. The cause was redocketed in the Circuit Court and again referred to the master to take further testimony. The master was also directed to consider all the testimony taken on the original reference. In the meantime appellant had purchased the note and mortgage in question and was, on motion, substituted as complainant. Thereupon appellant amended the bill by waiving all right to a deficiency decree, and sought to have the indebtedness satisfied out of the mortgaged property only.

The master's report following this re-reference found, among other things, that there was due from Wightman to the complainant the sum of $18.03. Upon the hearing the chancellor overruled all exceptions and entered a decree confirming the master's report. From that decree this appeal was perfected.

PAM, CALHOUN & GLENNON, attorneys for appellant.

W. A. HAMILTON, attorney for appellees.

MR. PRESIDING JUSTICE BALL delivered the opinion of the court.

Upon the prior hearing of this case in this court (Wightman v. Suddard, 93 Ill. App. 142) it was found and determined, upon the evidence then before the court, that the loan was usurious, as the statute relating to the method of loaning the funds of the association was not followed; and that Morley, having taken the property by conveyance from Paul, without any agreement, express or implied, to pay the mortgage, or any deduction on account thereof being made from the consideration paid for that conveyance, was not estopped from urging the defense of usury. The decree of the court below was reversed "and the cause remanded for further proceedings in conformity herewith." Under this remanding order the trial court had the power to enter an order re-referring the cause to the master to take further testimony. It also had the power to direct the master to consider all the testimony taken on the original reference, as well as that to be taken upon the re-reference, and to report his conclusions of law and of fact. Aurora & G. Ry. Co. v. Harvey, 178 Ill. 477.

The interest and premium exacted upon this mortgage are usurious, unless they come within the exception contained in the statute relating to loan and building associations. The interest was fixed at eight per cent upon $2,100, the face of the loan, while it is not disputed that the principal sum received by the borrower was but $1,680, the difference of $420 being the premium exacted for the privilege of getting the loan. The statute referred to requires that these associations shall loan their money in open meeting to the highest bidder.

The evidence shows that Paul, at the time he made this loan, also obtained other loans from the association. He went to the secretary of the association and "negotiated" with him as to the premium necessary to be paid to obtain

ley said he would look into the matter; that he came again and said he had concluded there was three or four hundred dollars in it for him to assume the mortgage; "so we concluded the deal that way." Paul gave back to Morley all his unpaid notes and turned the association pass-book over to him.

It is evident that the mortgage formed no part of the original consideration for the purchase of the premises. That transaction occurred two years before Morley knew of the existence of the mortgage. Paul purposely kept that knowledge from him and exacted the full consideration price in cash and in notes.

The question remains, under the evidence, did Morley, in his after-negotiations with Paul, assume and agree to pay the mortgage according to its terms; or did he, when he found the premises burdened with an incumbrance, make the best of a bad bargain, by getting back his notes and agreeing to take his chances upon the incumbrance? If the first proposition be proven, then Morley can not plead usury; if the latter be true, then that defense is open to him, and he has availed himself of it.

There is no evidence showing that when Morley took upon himself the burden of making these monthly payments upon the mortgage, he knew of the usury contained therein, nor that any deductions were made to him on account thereof. Nor is there any evidence as to what sum remained unpaid upon the Morley notes; nor does it appear that they understood or agreed as to what sum was then unpaid upon the mortgage notes. In short, the nature and terms of the settlement between Paul and Morley, other than that Morley's notes were surrendered to him and he took up the payment of the monthly dues provided for in the association mortgage, are not found in this record. What Morley did after that settlement was rightfully done, whether considered to have been done under an agreement to assume the mortgage or under an agreement to retain the property subject to the mortgage. The statement of Paul that Morley "assumed the mortgage," is not

evidence, for it is clearly but the opinion of the witness. He testifies as to what was said and done between them, and from that, considered in the light of all the other evidence upon this question, we must determine the nature and extent of the obligations which were incurred by Morley. The testimony upon this phase of the case, as shown by the printed page, is indefinite and unsatisfactory. The master, who saw and heard these witnesses, reported that Morley, by anything which occurred in his settlement with Paul, is not estopped to avail himself of the defense of usury. The learned chancellor approved that report in this regard. Such conclusion is not clearly against the weight of the evidence, and therefore we can not disturb it. Hagemann v. Hagemann, 102 Ill. App. 481.

Upon an accounting, Morley is entitled to have the various amounts which have been paid to the association upon this loan applied in payment of the principal sum received upon the loan, "regardless of whether they were designated payments on stock, interest or premiums." Jamieson v. Jurgens, 195 Ill. 86, 89.

As the amount of these payments exceeds the sum received on the loan, the court below erred in not finding that the loan in question had been paid in full.

The decree of the court below is reversed, and the Circuit Court is directed to enter an order dismissing the bill for want of equity. It is ordered that appellant pay all costs.

James H. Gormley v. Thomas R. Hartray.

1. APPEALS—*Only Persons Who Were Parties to the Judgment Appealed from Need be Summoned.*—In perfecting an appeal it is necessary to bring before the Circuit Court only those persons who were parties to the judgment appealed from.

2. PRACTICE—*Where But One Partner Has Been Served in a Suit Brought upon a Joint Obligation.*—Where but one of the partners has been served in a suit brought upon a joint obligation, the others not appearing, judgment may be taken against the partner who is served, and the others may be afterward brought in by *scire facias*.

3. PROMISSORY NOTES—*Duty of Maker to Take up His Paper.*—It is the duty of the maker of a promissory note, not payable at a particular place, to find his paper and take it up.

4. SAME—*When Demand of Payment is Necessary.*—A demand of payment of a promissory note is necessary only to fix the liability of an indorser or of a surety.

5. SAME—*Made Payable at a Particular Place—Demand.*—If a promissory note is made payable at a particular time and place, it is not necessary to aver or prove a demand at the place in order to recover.

6. INSTRUCTIONS—*Telling the Jury They Should Consider the Evidence "In the Light of the Knowledge Which You Have Obtained as Men of Affairs."*—An instruction which tells the jury that they should consider the evidence "in the light of the knowledge which you have obtained as men of affairs" is abstract. It does nothing more than to tell the jury to do what they could not honestly refrain from doing—that is, to use their common sense and experience.

7. WITNESSES—*The Question Put to the Witness Called to Impeach Another Should be Substantially Identical with the Original Question.*—In common fairness to a witness whom it is attempted to impeach by showing that at another time and place he stated what on his examination he declares he does not remember, the question put to the witness called to show such statement should be identical, or at least substantially identical, with the original question.

Assumpsit, upon a promissory note. Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge presiding. Heard in this court at the March term, 1902. Affirmed. Opinion filed January 26, 1903.

This is a suit upon a promissory note, payable on demand, dated December 3, 1895, to the order of appellee for the sum of $100, with interest at six per cent, signed by J. W. Hartray & Co. In December, 1895, prior thereto and for a little time thereafter, appellant and one J. W. Hartray were in partnership under the foregoing name in the purchase and sale of lumber. Hartray managed the business and kept the firm books. The partners are cousins, and appellee and J. W. Hartray are brothers. In 1896 the partnership was dissolved and J. W. Hartray disappeared for the time being. Appellant found that the partnership was insolvent. He ascertained its liabilities, as far as he could, and paid them with his own money. The brothers Hartray about this time fell out concerning their financial matters, but were afterward reconciled. The main defense

attempted to be made by appellant to this suit is that the note in question is not an obligation of the firm, but was made by the brothers for the purpose of defrauding him.

The case was begun in a justice court, where a separate judgment was rendered against appellant, the summons against J. W. Hartray being returned "not found." From this judgment appellant took an appeal to the Circuit Court. The case was there tried three times. The first verdict was in favor of appellee, the second was in favor of appellant. Each of these verdicts was set aside and a new trial granted because of intervening errors. The third trial resulted in a judgment against appellant. From this judgment he perfected this appeal.

GRIDLEY, CULVER & KING, attorneys for appellant.

WELLS & KELLY, attorneys for appellee.

MR. PRESIDING JUSTICE BALL delivered the opinion of the court.

First. Appellant says that this case has never been at issue because he alone was served; that his partner was not served in the justice court nor in the Circuit Court; nor was a summons issued for him in the latter court and returned "Not found," as required by the statute. To sustain this contention appellant relies upon Sec. 30, Chap. 79, Hurd's R. S. (1898), the material parts of which, as applicable to this case, we will hereinafter quote. This section was numbered 80 in the justice of the peace act as it stood prior to 1895. In 1895 this act was entirely revised by an act entitled, "An act to revise the law in relation to justices of the peace and constables." From this revision some fourteen sections of the old act (including in that number this section, now 180, then 80) were wholly omitted. Upon the hypothesis that this section is still in force, as to which we express no opinion, appellant is not helped thereby, for we think that it has no application to this case, because it applies to those parties only against whom the justice rendered judgment, and does not in any way affect parties

defendant who were not served before the justice and against whom no judgment was or could be rendered. It reads:

"When an appeal shall be taken by one of several parties from the judgment of a justice of the peace * * * the court shall have power to give the same judgment as though all the parties to the judgment had joined in the appeal, unless the appearance of the appellee shall be entered as herein provided."

In an appeal by one of two partners from the judgment of a justice of the peace against him alone, the other partner not having been served, the Circuit Court acquires the same jurisdiction which the justice had. The other partner, who was not served, and against whom no judgment was rendered, need not be summoned to appear in the Circuit Court. But the Circuit Court should hear and determine the case for or against the partner who appealed. This Court, in Fabbri v. Cunio, 1 Ill. App. 240, held:

"A defendant against whom no judgment was rendered in the trial before the justice need not be summoned to appear in the Circuit Court as a party defendant, on appeal by a co-defendant against whom a judgment was rendered. In perfecting an appeal it is necessary to bring before the Circuit Court only those persons who were parties to the judgment appealed from."

To the same effect are Stephens v. Cross, 27 Ill. 35, and Smith v. Irwin, 5 Gilm. 268.

Again: Where but one of the partners has been served in a suit brought upon a joint obligation, the others not appearing, judgment may be taken against the partner who is served, and the others can afterward be brought in by scire facias. Sherburne v. Hyde, 185 Ill. 582. Section 10 of the practice act, relating to sci. fa., and section 45 of the justice act, concerning the same writ, are in substance the same.

Second. Appellant says that no demand for payment was made upon him before the suit was commenced, and therefore this suit was prematurely brought. This proposition is not the law. It is the duty of the maker of a promissory note, not payable at a particular place, to find his

paper and to take it up. The demand is by the maker upon the holder. A demand of payment is necessary only to fix the liability of an indorser or of a surety. Allen v. Rightmere, 20 Johnson, 365. In Hunt v. Divine, 37 Ill. 137, 144, the Supreme Court say:

"A promissory note payable on demand, as against the maker, can be prosecuted to judgment without averring or proving any demand. So if it is made payable at a particular time and place, it is not necessary to aver or prove a demand at the place in order to recover. Butterfield v. Kinzie, 1 Scam. 445; Armstrong v. Caldwell, Ib. 546. In Wallace v. McConnell, 13 Peters, 136, it is likewise held that in actions on a promissory note against the maker, when the note is made payable at a specified time and place, it is not necessary to aver in the declaration and prove on the trial that a demand was made in order to maintain the action. But if the maker was at the place at the time specified, and was ready and offered to pay the money, it was matter of defense to be pleaded and proved on his part. This is the doctrine of all the courts of this country."

Third. Appellant complains that certain instructions he tendered were not given to the jury.

Number 2, telling the jury that they should consider the evidence "in the light of the knowledge which you have obtained as men of affairs," is abstract. Further, it did nothing more than to tell the jury to do what they could not honestly refrain from doing—that is, to use their common sense and experience. Number 6 has no basis in the evidence. Number 8 is covered by number 14, which was given. The law as laid down in number 10 is substantially set forth in given instruction number 11. Number 16 has no foundation in the evidence. A careful examination of the evidence and of the instructions given and refused convinces us that the learned trial judge did not err in this regard.

Fourth. Upon cross-examination of J. W. Hartray he was asked this question and made this answer:

"Q. You may state whether or not you stated to James H. Gormley, at 78 Randolph street, during the month of February, 1896, in the presence of Mr. Gormley, A. B. Pichereau and Stephen Havighorst, that there were no obli-

gations of the J. W. Hartray Co., other than those shown in the ledger which has been introduced and marked Defendant's Exhibit 'B?' A. I don't remember."

Intending to contradict this answer, appellant called the witness Havighorst, who testified:

"I have examined the day-book, cash-book and journal of J. W. Hartray & Co. for the months of November and December, 1895, and they show no entry of these transactions. I have examined the books all the way through and Thomas R. Hartray's name does not appear in those books in any way, shape or manner."

"Attorney for plaintiff: We will admit that these books do not show this transaction."

"Q. In February, 1896, were you present at the office of Bullard & Gormley, 78 Randolph street, and hear Mr. J. W. Hartray make any statement that these books, offered in evidence, showed all the business transactions of the firm of J. W. Hartray & Co.?"

To this question an objection was made which the court sustained. Appellant excepted, and now urges the sustaining of this objection as reversible error. The question asked Hartray and his answer thereto that he "did not remember," laid the foundation for the putting of an impeaching question. Ray v. Bell, 24 Ill. 444. But in common fairness to a witness whom it is attempted to impeach by showing that at another time and place he stated what on his examination he declares he does not remember, the question put to the witness called to show such statement should be identical, or at least substantially identical, with the original question. That question shows appellant, A. B. Pichereau and Stephen Havighorst present, and "that there were no obligations of the J. W. Hartray Co. other than those shown in the ledger." The question asked Havighorst fails to state that either appellant or Pichereau was present, and the statement was "that these books offered in evidence showed all the business transactions of the firm of J. W. Hartray & Co." We are of the opinion that the original question was not as closely adhered to as the law requires, and that therefore the objection was properly sustained.

The judgment of the Circuit Court is affirmed.

The Suburban R. R. Co. v. Emma Malstrom.

1. INSTRUCTIONS—*Party May Have the Jury Instructed as to the Issues and the Law Bearing upon His Theory of the Case.*—A party has a right to have the jury instructed as to what the issues are and the law bearing upon his theory of the case, if there is evidence tending to sustain such theory.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. GEORGE W. PATTON, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Reversed and remanded. Opinion filed January 16, 1903. Rehearing denied February 3, 1903.

CLARENCE A. KNIGHT and WILLIAM G. ADAMS, attorneys for appellant.

JAMES C. MCSHANE, attorney for appellee.

MR. PRESIDING JUSTICE WATERMAN delivered the opinion of the court.

This was an action to recover for loss alleged to have been sustained by reason of the negligence of appellant. The alleged negligence was charged as follows:

"The plaintiff was then and there at said stopping place, and desired to become a passenger upon said car, and when said car stopped, the plaintiff attempted to board said car as a passenger, and while in the act of getting upon said car while it was so standing, and while she was exercising due care and caution for her own safety, the defendant's servants, without giving the plaintiff any warning, negligently and unexpectedly to the plaintiff violently started said car, and the plaintiff was thereby then and there thrown into a ditch alongside of said track."

The contention as to the questions of fact was largely whether appellee was in the act of getting upon appellant's car as a passenger and was thrown by the sudden starting thereof, or whether she was one of a hurrying crowd on the platform and was by such crowd pushed off the platform and so fell into a ditch.

Appellant contended that there was no sudden starting

of the car, nor any, without warning, and that the starting of the car was in nowise the cause of the injury to appellee.

There was evidence tending to sustain the contentions of the respective parties. Appellant asked that the jury be instructed as follows:

"The court instructs you that the allegations in plaintiff's declaration that she was thrown into a ditch alongside the defendant's railroad tracks by and on account of its car being violently started up is a material allegation and must be proved by her, as alleged, by a preponderance of the evidence in the case, and she can not recover unless she has so proven such allegations; and if you believe from the evidence in the case that she fell into said ditch in some other way or from some other cause, then she can not recover in this suit and you should find the defendant not guilty."

This the court refused to give, but gave the following:

"The court instructs you that the allegations in plaintiff's declaration that she was thrown into a ditch alongside the defendant's railroad tracks by and on account of its car being violently started up just as she was attempting to board it, is a material allegation and must be proved by her, as alleged, by a preponderance of the evidence in the case, and she can not recover unless she has so proven such allegations; and if you believe from the evidence in the case the car was not suddenly started, but that she fell into said ditch from some other cause, then she can not recover in this suit and you should find the defendant not guilty. To which ruling of the court in refusing to give said instruction as requested, and in modifying said instruction, and in giving said instruction as modified to the jury, the defendant, by its counsel, then and there duly excepted."

The allegations of the declaration in the instruction given are not stated with entire accuracy; the charge is that "while in the act of getting upon said car" not "just as she was attempting to board it." The fault with the instruction given is, however, that it tells the jury that they must find the defendant not guilty if two things exist, viz., that the car was not suddenly started and that plaintiff fell into the ditch in some other way or from some other cause.

Under the declaration the plaintiff could not recover

unless she was thrown into a ditch as a result of the sudden starting of the defendant's car.

The modified instruction given by the court was misleading and prejudicial. A party has the right to have the jury instructed as to what the issues are and the law bearing upon his theory of the case, if there is evidence tending to sustain such theory.

The defendant was entitled to an instruction that if the plaintiff fell into the ditch from some other cause than the starting of the car, she could not recover, and to have the attention of the jury clearly called to that issue. Illinois Central Ry. Co. v. King, 179 Ill. 91; same v. same, 77 Ill. App. 581; Fessenden v. Doane, 89 Ill. App. 229; same v. same, 188 Ill. 228; Baltimore and Ohio S. W. Ry. Co. v. Faith, 175 Ill. 58; West Chicago St. Ry. Co. v. Kautz, 89 Ill. App. 309; Chicago Heights L. Association v. Butler, 55 Ill. App. 461.

As a good deal of evidence had been given showing that the car did not stop at the platform, but that the rear end of the car was from one to two feet beyond the platform, although this was neither charged in the declaration as negligence nor at all, the defendant as to this asked to have the jury instructed as follows:

"The court instructs you that the plaintiff can not recover in this case on account of the defendant not having its car stop at the platform at the time plaintiff claims she attempted to board said car and was hurt; that is not alleged in plaintiff's declaration herein as an act of negligence on the part of defendant, therefore she can not recover on that account."

The defendant also asked to have the jury instructed as follows:

"The court instructs you that if you believe from the evidence in this case that the plaintiff was crowded off or fell from the end of the station platform, and was not thrown therefrom by the violent starting up of the defendant's car, then she can not recover in this case and you should find the defendant not guilty."

We think these instructions should have been given as

calling attention to the theories of the defendant based upon evidence in the case.

The judgment of the Superior Court is reversed and the cause remanded.

Herman Eickstaedt v. Augusta Moses.

1. DEBTOR AND CREDITOR—*Right to Prefer Creditor.*—A debtor has a right to prefer one creditor to another, and a creditor has a right to obtain a preference over the claim of another so long as it is not done to aid the debtor in hindering and delaying his creditors.

2. FRAUD—*Not to Be Presumed.*—Actual fraud is not to be presumed; it must be proven by him who alleges it; and if the motive and design of the act may, under the evidence, as well be traced to an honest and legitimate source as to a corrupt one, the former is to be preferred.

3. CHATTEL MORTGAGES—*What Must Be Shown in Order to Impeach.*—To impeach a mortgage of personal property it is necessary to show that both mortgagor and mortgagee designed to hinder, delay or defraud creditors.

Bill to Foreclose a Chattel Mortgage.—Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Reversed and remanded with directions. Opinion filed January 16, 1903. Rehearing denied February 3, 1903.

FRANCIS T. MURPHY, attorney for appellant; EDWARD C. HIGGINS, of counsel.

ELI MOSES, attorney for appellee; L. A. MCDONALD, of counsel.

MR. PRESIDING JUSTICE WATERMAN delivered the opinion of the court.

Upon the hearing of this cause it appeared that appellant, many years ago, being an agent for a brewery and engaged in the selling of beer upon commission, loaned money to Mrs. Johanna Zetlmeier, she being then the keeper of a saloon, and buying beer from him. She does not appear to have paid him anything on account of said loan, but con-

tinued to buy beer—presumably there was a profit to him from her as a customer. A few years ago she desired to go to Germany, and thought if she did so she could get money with which to pay her indebtedness to appellant, whereupon he let her have $100 more. This was in January, 1896.

It did not appear that prior to April 30, 1900, appellant had any written evidence of such indebtedness; upon that date Mrs. Zetlmeier gave him a note for $700 and a chattel mortgage upon a quantity of furniture and housekeeping utensils. Mrs. Zetlmeier was at that time indebted to Augusta Moses, her landlord, for some five months' rent. Shortly after the making of the chattel mortgage the landlord issued a distress warrant and levied upon the mortgaged property, whereupon appellant sued out a writ of replevin and retook the goods and also filed a bill to foreclose his mortgage. All of these various proceedings came on to be heard in the Circuit Court at one and the same time. The court found that the chattel mortgage was given by Mrs. Zetlmeier to hinder, delay and defraud creditors and was therefore void. The bill to foreclose was thereupon dismissed and the property replevied returned to appellee.

The action of the trial court seems to have been predicated upon the conclusion that the indebtedness, if any there were, from Mrs. Zetlmeier to appellant, was out-lawed, that is, that the statute of limitations had run against it at the time she gave the chattel mortgage to appellant; that it was improbable that with an honest purpose she would have given a chattel mortgage to secure a debt against which she had a good defense by way of the statute of limitations; that her action in so doing was in pursuance of her determination to prevent her landlord from obtaining anything upon her claim against his, and that the circumstances under which the chattel mortgage was given were such that appellant must have known it was not made for the *bona fide* purpose of securing him, but for the fraudulent purpose of defrauding another creditor, namely, her landlord. That appellant's claim was and is a just and

valid one, we think there is no doubt. There certainly was no evidence to the contrary.

Both appellant and Mrs. Zetlmeier testified to the inception of the debt, and that it had never been paid. Indeed, Mrs. Zetlmeier appears not to have known, until she testified as a witness upon the trial, that she could have had a defense to appellant's claim by way of the statute of limitations. It by no means with certainty appeared that the statute of limitations had run against such claim, nor was such issue presented to the trial court. On the contrary, it did appear that so late as 1896 Mrs. Zetlmeier had in effect promised to pay the debt, and as a means of doing so had borrowed an additional sum with which to go to Germany, where she expected to obtain money and thus pay up appellant.

It is very probable that but for the indebtedness to her landlord, Mrs. Zetlmeier would not have made the chattel mortgage in question; that she had right to prefer appellant is unquestionable, and that appellant had an equal right to obtain a preference over the claim of appellee there is no doubt. Union National Bank v. State National Bank, 168 Ill. 256; Goldstein v. Smiley, 68 Ill. App. 49; Juillard v. Walker, 54 Ill. App. 517; Wickler v. The People, 68 Ill. App. 282; McConnell v. Scott, 67 Ill. 274; Hessing v. McCloskey, 37 Ill. 341.

It is true that if a creditor accepts a preference for the purpose of aiding his debtor to hinder and delay his creditors, although there be a *bona fide* indebtedness which is secured by the preference, yet by reason of his intentionally aiding his debtor to hinder and delay his creditors, his security will be regarded as fraudulent and void. Young v. Clapp, 147 Ill. 176.

In this case the burden of proof was upon appellee. Actual fraud is not to be presumed; it must be proven by him who alleges it; and if the motive and design of an act may, under the evidence, as well be traced to an honest and legitimate source as to a corrupt one, the former is to be preferred. McConnell v. Wilcox, 2 Ill. 344–364; Wright

v. Grover, 27 Ill. 426–430; Bowden v. Bowden, 75 Ill. 143–147; Mey v. Gulliman, 105 Ill. 272–285.

To impeach a mortgage of personal property it is necessary to show that both mortgagor and mortgagee designed to hinder, delay or defraud creditors. Brown v. Riley, 22 Ill. 45–52; Myers v. Kinzie, 26 Ill. 38; Gridley v. Bingham, 51 Ill. 153–155.

There is in this case no evidence that appellant had any intention to do or aid in anything save to obtain security for his debt. The claim of appellee that appellant was not a *bona fide* creditor of Mrs. Zetlmeier, as well as that he intended to aid her, or be engaged in any way in a plan to hinder, delay or defraud appellee, is based entirely upon conjecture. The evidence is that Mrs. Zetlmeier honestly owed appellant $700; that for the purpose of securing him and quite probably giving him a preference over appellee, the chattel mortgage under consideration was made. We do not look upon the fact that after appellant had taken the property by replevin, he returned it to Mrs. Zetlmeier and allowed her to use it in her boarding house, as a badge of fraud.

By the conditions of the chattel mortgage she was permitted to retain possession of the property and the return of it to her was but placing it in the position in which it was before the levy under appellee's distress warrant. Moreover, appellant, if he had not done this, would have been put to the expense of storing the property until the termination of the litigation, as that any third party would buy the same when the right to the possession of it was in controversy in court was not to be expected.

Appellant did at once file his bill to foreclose and so speedily as possible was proceeding to have his right to sell the same determined. What motives actuated Mrs. Zetlmeier in desiring to prefer appellant as a creditor, if she did not do so for the purpose of hindering, delaying or defrauding her other creditors, is immaterial. It is easy to see that she may have felt more kindly toward and more anxious to secure a creditor who had for many years been

so lenient in his dealings with her rather than her landlord. It is certainly not to be assumed that a creditor looks upon the claim of his landlord more favorably than he does upon his indebtedness to one who has loaned him money; nor can a court of chancery regard it as a badge of fraud that a woman should have been anxious to pay a debt barred by the statute of limitations; so far from such feeling upon her part being an indication of fraud, it was in a high degree meritorious, and such feeling alone is, if it be unusual, not so much indicative of a fraudulent as of an honest purpose and heart.

The judgment of the Circuit Court in the action of replevin is reversed and the cause remanded.

Mrs. J. W. Hutchinson et al. v. Ernest A. Sine et al.

1. APPELLATE COURT PRACTICE—*Where the Judgment Has Been Erroneously Entered.*—Where the clerk of the trial court in writing up the judgment makes an erroneous entry of judgment against one not brought under its jurisdiction, the judgment must be reversed and the cause remanded generally.

Assumpsit.—Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANECY, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Reversed and remanded. Opinion filed January 16, 1903. Rehearing denied February 3, 1903.

C. O. GARMIRE and GRANT NEWELL, attorneys for appellees.

WILLIAM GIBSON and F. W. BECKER, attorneys for appellants.

MR. JUSTICE FREEMAN delivered the opinion of the court.

Judgment was entered in this case, reciting as follows: "Therefore it is considered by the court that the plaintiffs do have and recover of and from the defendants, Mrs. J. W. Hutchinson, S. S. Hutchinson and W. S. Hemby, his said damages of $1,154.17 in form as aforesaid by the jury assessed, together with his costs and charges in this behalf

expended, and have execution therefor." It appears that while the suit as begun included the three defendants named against whom the judgment was rendered, only two of them were served with summons, and the third defendant, W. S. Hemby, who was not served, never entered his appearance. He does not appeal, and the attention of the trial court does not seem to have been called to the erroneous entry of judgment against one not brought under its jurisdiction. It was probably an oversight or mistake by the clerk in writing up the judgment. Nevertheless the law in this state is apparently settled, that in such case the judgment must be reversed and the cause remanded generally. In Knights of Honor v. Goldberger, 175 Ill. 19, the trial court had entered judgment against two defendants, one of whom was not served and had entered no appearance. The Appellate Court reversed the cause because of the same error, but inasmuch as the evidence supported the verdict against the party which had been properly brought in by summons, the Circuit Court was directed to enter judgment on the verdict against such defendant.

The Supreme Court says: "The judgment was a unit as to both defendants, and should have been reversed as to both and remanded generally." We are precluded, therefore, from endeavoring to correct the mistake in order to give effect to the judgment in the case at bar against the parties properly served. There seems to be no way of avoiding a new trial for all parties.

The judgment bad as to one is bad as to all. See, Grace v. Casey-Grimshaw Marble Co., 62 Ill. App. 149, and cases cited; also cases cited in Knights of Honor v. Goldberger, *supra*. The judgment of the Circuit Court is reversed and the cause remanded.

Franz J. Weber v. Albert Zacharias et al.

1. STATUTE OF LIMITATIONS—*When it Begins to Run as Between Partners.*—The statute of limitations does not begin to run against a right by one partner to sue another for an accounting until the partnership affairs have been entirely closed.

2. EQUITY—*Party Seeking Equity Must Do Equity.*—The partner of a judgment debtor who keeps in his hands money belonging to the execution creditors must pay interest thereon when he seeks relief in a court of equity.

Bill for an Accounting.—Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANECY, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Reversed and remanded with directions. Opinion filed January 30, 1903.

Appellant filed in the Circuit Court his bill for an ascertainment of the state of and right to the assets of the partnership once existing between him and appellee, Albert Zacharias.

The bill having been answered the cause was heard upon the following stipulation of facts:

"It is stipulated by the parties to this suit that this cause be tried upon the facts hereinafter stated, and upon none others, and that not only upon hearing of this cause in the Circuit Court, but also in the Appellate and Supreme Courts the following, and the following only, shall be taken as and for the facts of the case:

I. On November 5, 1891, Franz J. Weber and Albert Zacharias entered into a partnership in the saloon business, without any written articles of copartnership, but Weber paid Zacharias $1,000 as a purchase price of a half interest in said saloon business and all assets thereof, and received from Zacharias a bill of sale for said half interest, dated November 5, 1891, and in the usual form.

II. After his entry into partnership, Weber ascertained that Zacharias was indebted to a number of persons, including Metzger, Crocker and Rindskopf, and that the creditors were clamoring for the amounts due them, and made demands upon Zacharias and Weber for the payment thereof.

III. The stock, fixtures, etc., of the business were subject to a chattel mortgage of $850 to the Northwestern

Brewing Co., mortgagee, executed and acknowledged by Zacharias, and recorded, of which mortgage Weber was informed prior to his purchase of his half interest.

IV. On November 16, 1891, Zacharias executed and delivered to Weber a second bill of sale of his remaining half interest in the business, for the expressed consideration of $2,000; but that in the proceedings hereinafter mentioned it has been judicially determined that there was no consideration for said transfer, but that the same was made by Zacharias for the purpose of hindering and delaying Zacharias' creditors, and that the transfer was fraudulent and void at law.

V. On November 21, 1891, judgments were rendered against Zacharias, in favor of Samuel Rindskopf in Circuit Court, $694.50 and costs; in favor of Wilford D. Crocker in Superior Court, $250 and costs; in favor of Charles H. Metzger in Superior Court, $138.02 and costs; and executions issued thereon and were delivered to the then sheriff of Cook county, who, by his deputy, levied the same upon the partnership interest of Zacharias in fixtures, stock, etc., of said copartnership, on the same day.

VI. On November 24, 1891, Weber sued a writ of replevin out of Circuit Court, against sheriff, and thereby secured possession of all the property of the partnership; the replevin suit was non-suited by Weber.

VII. On November 27, 1891, Weber sold all assets of said business, including fixtures and stock, to one Rack, for $2,800, and that by request of the purchaser Zacharias joined in the bill of sale; out of the proceeds of sale Weber paid the mortgage, rent and other partnership debts, leaving in his hands, as the net proceeds of said sale, $1,383, which sum was deposited with August Lenzen as security to indemnify him from liability as surety on the replevin bond given in said replevin suit.

VIII. A writ of retorno habendo was ordered issued in the replevin suit when the non-suit was entered; afterward the coroner brought suit upon the replevin bond given to him in the replevin suit, against Weber, the principal thereon, and August Lenzen and Martin Bock, securities thereon; that said suit was prosecuted and defended on both sides as diligently as the state of the calendars of the court would permit and was tried December 9, 1896, and resulted in a verdict of debt, $3,000, and damages one cent. The verdict was set aside and a new trial granted. On November 30, 1898, the case was tried again, but by the

court, without a jury, and judgment was rendered for $3,000 debt, and $1,383 damages, debt to be discharged on payment of damages and costs; from this judgment Weber and his sureties appealed to the Appellate and Supreme Courts, in each of which the judgment was affirmed.

IX. On December 2, 1898, at the term at which judgment was rendered in the Circuit Court, the order recited in the bill of complaint and found on Abst., p. 4, Rec., p. 26, *ante*, was entered by the Circuit Court in said suit on said replevin bond.

X. On January 2, 1901, a certified copy of the order of affirmance of the Supreme Court was filed in the Appellate Court, and a certified copy of the latter court's order of affirmation was filed in the Circuit Court in said action of debt and thereupon an execution issued out of said Circuit Court to E. J. Magerstadt, sheriff of Cook county, against Weber and his sureties for $3,000 debt and $1,383 damages, and costs; that the interest due thereon is $151.35, and that the Supreme, Appellate and Circuit Court costs in said cause amount to $30.90; and that the amount, therefore, due upon the said judgment, including interest and costs to date, is $1,565.25; that said execution is now in the hands of Henry Spears, a deputy of Sheriff Magerstadt, and is about to be enforced by levy upon the real and personal estate of Weber and his sureties. But complainant does not admit that the defendants are entitled to interest.

XI. A reference of this cause to a master to state an account is waived by all parties, and it is agreed that this suit be determined as though upon a reference and accounting it had been determined; that at the date of the levy of the execution aforesaid, and at the date of sale of the partnership assets, the interests of Weber and Zacharias in the partnership were equal, and that each of them, except for the sale and levy, would have been entitled to one-half of the property or one-half of the proceeds thereof.

XII. It is intended hereby to state an account between the said former copartners, in order to avoid the expense and delay necessitated by having an account stated by a master.

XIII. After November 27, 1891, the date of the sale to Rack, the partnership did no further business, nor did Weber and Zacharias transact any further business together; no suit for a dissolution of the partnership was brought by either party, after its formation, nor after the sale, until this bill was filed January 2, 1899; nor was any suit in equity or action of any sort brought against the sheriff or

coroner or the judgment creditors aforesaid, for any relief, either legal or equitable, after the levy of the execution on November 16, 1891, except the replevin suit, until the filing of this bill."

At the hearing appellees insisted that the bill could not be maintained, urging that more than five years had elapsed since the termination of said partnership and the winding up of all its business by a sale, and conversion into money, of all its assets, which sale and conversion was had more than five years prior to the filing of the bill in this case.

J. HENRY KRAFT, attorney for appellant.

EDGAR BRONSON TOLMAN and SUMNER C. PALMER, attorneys for appellees.

MR. PRESIDING JUSTICE WATERMAN delivered the opinion of the court.

Counsel for appellee say that the bill filed herein is primarily a bill for a partnership accounting and dissolution and that the relief prayed for against the judgment creditors and sheriff is absolutely dependent upon the establishment of the right to the relief prayed for against Zacharias. We fail to see why it was necessary that Zacharias be made a party to appellant's bill. Under the stipulated facts it is apparent that the sum in appellant's hands is not sufficient to discharge the claim of the judgment creditors who are parties to the bill. There can be no residuum left for Zacharias. Moreover, Zacharias, if he had no creditors, could not establish a claim to the assets in appellant's hands, or any portion thereof. Zacharias, for the purpose of defrauding his creditors, made a bill of sale to Weber of all his interest in the partnership assets. Having so done he can not, as against Weber, for his own benefit, set up his own fraud and compel Weber to give him one-half or any proceeds of the sale of such partnership assets. Appellant has doubtless been badly advised and has persisted in insisting that the bill of sale made to him by Zacharias was *bona fide* and upon a good and valid consideration, until the judg-

ment of the highest court in the state has been rendered against him on this matter.

His persistence in this may have been induced by the stipulated fact that on the first trial in the Circuit Court, upon the question of whether there was a *bona fide* sale to him for a valuable consideration, the verdict of the jury was in his favor; that being set aside and a new trial granted, the Circuit Court, jury having been waived, found that there was no consideration for the bill of sale made to him, but that the same was made by Zacharias for the purpose of hindering and delaying his creditors and that the transfer was fraudulent and void at law. Having unsuccessfully presented an appeal to the Supreme Court from the judgment of the Circuit Court, appellant was left in the position of having, by a writ of replevin, taken from the sheriff partnership assets which the sheriff had levied upon to satisfy judgments against Zacharias. Such action could not be maintained. Appellant has thus been compelled to apply to a court of equity to prevent his interests in the assets being used for the satisfaction of claims against Zacharias only.

His bill under the stipulated facts is really not for an accounting. There is no pretense that Zacharias has anything to account for. It is conceded that long prior to the filing of the present bill of sale as well as by actual delivery, Zacharias transferred all the assets to appellant. This bill of sale and transfer was fraudulent and void as to the creditors of Zacharias, but good against him personally. Under the stipulated facts the bill of appellant became in effect a tender by him to the sheriff for the benefit of the judgment creditors of the entire interest which Zacharias had in the partnership assets levied upon.

It is conceded by the stipulation that appellant took the entire assets of the firm, sold them for the sum of $2,800, Zacharias, at the instance of the purchaser, joining in the bill of sale to such purchaser; that appellant, having received such $2,800, paid off a chattel mortgage thereon amounting to $850, which mortgage existed prior to the making of the bill of sale to appellant, and paid off all the partnership

debts, thus discharging claims against the partnership assets superior to the claims thereon of the personal creditors of Zacharias; and that the net proceeds, the result of such sale and such payment, left in the hands of appellant the sum of $1,383.

The validity and good faith of such sale and such payments by Weber, as well as that the net result thereof was the remaining in his hands of $1,383, is not contested. Had appellant been better advised, and instead of, under an action of replevin, taking the property levied upon away from the sheriff, let it be sold by him, the result would have been that whosoever had purchased the partnership assets would have acquired only the right, title and interest therein theretofore possessed by Zacharias; and if such party or parties had failed to come to an understanding with appellant it would have been necessary that equitable proceedings be had, either at the instance of appellant or upon application of the purchaser or purchasers of such assets, for a distribution of the same or the proceeds thereof, in accordance with the right and title of appellant and that of such purchaser or purchasers.

The sheriff, by a levy made under the executions against Zacharias, could not, by execution sale, acquire exclusive ownership and right of possession to said assets or any part thereof. Weber v. Hertz, 188 Ill. 68–71.

Appellees insist that by section 7 of the stipulation it appears that not only did Weber, November 27, 1891, sell the entire partnership assets for $2,800, but upon the same day paid the mortgage, rent and other partnership debts. We do not think that it appears from the stipulation that such payment took place upon the day on which the money was delivered to appellant.

We are not prepared to hold that in this state the statute of limitations runs against a right by one partner to sue another for an accounting before the partnership affairs have been entirely closed. As to this, see Askew v. Springer, 111 Ill. 662; Todd v. Administrators of Phillip Rafferty Estate, 30 N. J. Eq. 254; Storm v. Cumberland, 18 Grant's Chancery Reports, 245; McClung v. Capehart, 24 Minn. 17;

Coudrey v. Gilliam, 60 Mo. 86; Bates on Partnership, sections 949–950.

By the stipulation it appears that November 27, 1891, appellant had in his hands the sum of $1,383, as the proceeds of the sale of the partnership assets of Weber and Zacharias. One-half of this sum, they being equal partners, should have been paid to the sheriff to apply upon the executions against Zacharias, under which a levy had been made upon the partnership assets, such one-half not being equal to the amount of such executions. While, as before stated, it does not appear that the payments out of the $2,800 received by appellant were made November 27, 1891, nor at what time the last of such payments was made. Nevertheless, however great the time before the last of such payments was made and the business of the firm of Weber & Zacharias thus finally closed, appellant must have had in his hands, since November 27, 1891, $1,383, one-half of which, as before stated, belonged and still belongs to said execution creditors of Zacharias. Appellant has come into a court of equity to obtain relief against a judgment obtained upon a bond which he filed in the action of replevin. Having come into a court of equity, he must do equity. It is not equitable that he should keep in his hands money belonging to the execution creditors of Zacharias without paying interest thereon.

The decree of the Circuit Court will be reversed and the cause remanded, with directions to enter a decree against appellant for one-half the said sum of $1,383, together with interest thereon at five per cent per annum from November 27, 1891, and also for the sum of $30.90 costs taxed against appellant in the Supreme, Appellate and Circuit Courts under the judgment entered against him in the Circuit Court upon the suit on the replevin bond given by him; and that upon the payment by appellant of such sums to the sheriff of this county for the use of the plaintiffs in the said executions against the said Zacharias, the judgment entered November 30, 1898, in the Circuit Court against appellant, August Lenzen and Martin Boch for $3,000 debt and $1,383 damages be set aside and discharged.

105 647
r203s 492

Chicago & Eastern Illinois R. R. Co. v. Charles J. Heerey, Adm'r.

1. PROXIMATE CAUSE—*Defined.*—The proximate cause is that cause which stands next in causation to the effect, not necessarily in time or effect. but in causal relation.

2. DAMAGES—*When $5,000 is Not Excessive.*—Deceased, a fireman on a switch engine, twenty-two years of age, was killed by reason of the separation of the engine and the tender, caused by the breaking of a defective coupling pin. He left surviving him his mother, who not only had been for years and was at the time of his death, living with and being supported by him, but under section 1, chapter 107, of the Revised Statutes, was entitled to be supported by him, if she were poor and unable to earn a livelihood by reason of an unavoidable cause. *Held*, that $5,000 damages for his death is not excessive.

3. FELLOW-SERVANTS—*When Engineer and Fireman of a Switch Engine Are Not.*—An engineer of a switch engine who neglects to attach the safety chains connecting the engine and tender, is not, as to such matter, a fellow-servant of the fireman who had been at work with him only since the morning of the day of the accident.

Trespass on the Case.—Death from negligent act. Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Affirmed. Opinion filed January 30, 1903.

WILL H. LYFORD and K. M. LANDIS, attorneys for appellant; ALBERT M. CROSS, of counsel.

JAMES C. MCSHANE, attorney for appellee.

MR. PRESIDING JUSTICE WATERMAN delivered the opinion of the court.

In this case appellee obtained a judgment against appellant for $5,000, because of its alleged negligence in causing the death of Joseph Heerey.

The deceased was acting as an extra fireman upon appellant's switch engine number 211, and was killed on the evening of October 21, 1898, by falling between the tender and engine while in motion, being run over by the tender. His fall was caused by the separation of the engine and tender as the train was running, such separation being

due to the breaking of a drawbar pin and the absence of any chains connecting the engine and tender.

At the time of the separation he was standing with one foot on the engine, the other on the tender, and was shoveling coal into the locomotive furnace.

The declaration contained counts, some of which charged that appellant was negligent in providing a defective pin by which the drawbar between the engine and tender was attached to the former. Other counts charged that appellant was negligent in failing to provide, as is customary, chains holding the engine and tender together, so that they will not separate in case of any breakage of the coupling drawbar or its connecting pins. That the chains used for holding the engine and tender together were not fastened and were consequently useless at the time of the accident, is admitted. It is not disputed that one of the pins by which the drawbar was held in place, was defective, but it is insisted by defendant that such defect, being due to the crystallization of the iron, was undiscoverable by reasonable examination, indeed, without breaking the pin.

The court instructed the jury that there could be no recovery upon the counts of the declaration which charged that the defendant was negligent in supplying a defective coupling pin. Appellee insists that in so doing the court erred; that the evidence showed that the defect in the coupling pin was of such a character that it could have been discovered by the defendant by a reasonable and practicable examination; that the jury so found and that such verdict of the jury as to this matter is sustained by the evidence. We can not assent to this contention. However true it may be that jurors are but little influenced by, and ordinarily fail to understand the multitudinous written instructions given to them, theoretically such is not the case, and a jury must be presumed to have understood and obeyed instructions of the court that under certain counts there can be no recovery, unless it appears from the record that it did not.

The question of the alleged negligence of the defendant

in supplying a defective coupling pin was not submitted to the jury, consequently it must be presumed that no verdict was rendered thereon.

Appellant insists that the proximate and sole cause of the accident was the defective coupling pin. That the accident would not have happened had the chains been in use is clear. That they were designed to and ordinarily were in position so as to have prevented such an accident is admitted.

It appears that when the engine went out on the morning of the day of the accident, an attempt was made by the engineer to couple these chains, but for some reason the tender was standing so high that the hook of the chain could not be made to reach into the eye; that is, the engine and tender not standing at an even height, the chains were a little too short. Several attempts were made during the day to couple these safety chains, but without success. It appeared that there was upon the engine, apparatus such as jacks, screws and levers, by which, it is claimed, the engine might have been raised so that the chains could be fastened, and it is insisted by appellant that the deceased was negligent in not doing this. As is common knowledge, the fireman, in respect to what shall be done with the engine, is under the control of the engineer. There is no evidence showing that the deceased could, without the direction and assistance of the engineer, have raised the engine so as to bring it on a level with the tender, and it is to a considerable degree a conjecture, that had this been done, the chains could have been fastened. The absence of the safety chains was the proximate cause of the accident. The proximate cause is that cause which stands next in causation to the effect, not necessarily in time or effect, but in causal relation. Pullman Palace Car Co. v. Laack, 143 Ill. 242.

It is also urged by appellant that not only was the deceased guilty of contributory negligence in not fastening these chains, but that if the failure to fasten them was the negligence of the engineer, then the engineer was a fellow-servant of the deceased and no recovery can be had because of the negligence of such fellow-servant.

It must be borne in mind that this was not a passenger or freight, but a switch engine; that the engineer was directed by appellant to take said engine out; that the deceased was acting under his orders; that the safety chains were not coupled up when the engine left the round-house on Monday morning; that the engine had been in the round-house from the previous Sunday. It does not appear that it was the duty of the engineer to put the engine in order before taking it out, or to fasten the engine and tender together with the safety chains, although it does appear that the foreman of the round-house from which the engine was taken on Monday morning, it having been there since the previous Sunday, endeavored to couple the chains at the round-house and again at the water-tank. Appellant thus had notice through its round-house foreman that the safety chains were not in place and could not by ordinary effort be put in place, when the engine was sent out for work. Under the circumstances, we do not think that the deceased or the engineer was guilty of contributory negligence in not stopping the engine and making an endeavor by use of jack-screws and levers to bring the engine to a position where the safety chains could be coupled. Nor do we think that if the engineer was negligent in this regard, he was as to such matter at this time a fellow-servant of the deceased. The deceased had been at work with this engineer at the time of the accident only since the morning of the day he was killed.

The deceased left him surviving his mother, with whom he lived, and two brothers, not members of his family. The deceased was a native of Mattoon, Illinois, where he had attended the public and parochial schools. At thirteen he attended a college at Teutopolis, where he graduated when he was seventeen years of age. After leaving college he worked as a fireman on the Big Four Railroad, living with his mother. He afterward worked in the Rock Island and Illinois Central Railroad shops. When he came to Chicago, his mother followed him and they lived together from that time until his death. He was a healthy

man, twenty-two years of age, and very capable. His "boss" said he intended to promote him. His habits were good; he was saving, did not drink, and was very industrious; was a bright, intelligent, unmarried young man. His mother testified that he gave her his earnings. Being asked if she knew what wages he received as a fireman, she said, "He gave me 60—" whereupon she was prevented, by objection, from making further answer. Objection was made to any testimony that he contributed to the support of his mother. Counsel for appellee repeatedly offered to show that he did support his mother, but upon objection conceded that he was of the opinion that under a recent decision of the Supreme Court, such evidence was not admissible. While the testimony of the mother of the deceased that he did give his wages to her was not stricken out, yet the ruling of the court upon objections made to such testimony was such that indirectly such evidence was excluded. That the evidence of support was not given was due to objections made by appellant. Having made this objection in the trial court and succeeded in preventing appellee from showing what he offered to do in this regard, we do not think that appellant can here be heard to insist that the judgment in this case must be reversed, because there was no evidence showing that the mother of the deceased was supported by him. Nor do we think that counsel for appellee waived his question by conceding that under the law it was not proper. It was an honest and manly thing for him to truthfully state his opinion as to the law. A lawyer is not obliged to lie in order to retain the benefit of a question he had asked.

It is insisted that the damages awarded are excessive. It being urged that the mother of the deceased was a collateral relative; that lineal descendants, within the meaning of the rules established under the statute upon which this suit is predicated, are the children of the person from whom descent is traced; that under the common law an estate did not lineally ascend. The statute of descent has changed the rule of the common law, and in this state parents and brothers, as to inheritance, stand on an equality.

The mother of the deceased not only had been for years, and was at the time of his death, living with and being supported by him, but under section 1, chapter 107 of the Revised Statutes, she was entitled to be supported by him, if she were poor and unable to earn a livelihood, by reason of an unavoidable cause.

In Bradley v. Sattler, 54 Ill. App. 504, 156 Ill. 603, a judgment of $5,000 recovered for the benefit of a mother and two brothers, on account of the pecuniary loss by them sustained by reason of the death of a boy twelve years and three months old, was sustained; and this, in the absence of any evidence showing any pecuniary loss; the jury inferring from their experience the amount of such loss, in accordance with the rule enunciated in City of Chicago v. Major, 18 Ill. 349; Chicago & Alton R. R. Co. v. Shannon, 43 Ill. 338–347; City of Chicago v. Scholten, 75 Ill. 468–471; City of Chicago v. Keefe, 114 Ill. 222–230; Ohio & Mississippi Ry. Co. v. Wangelin, 152 Ill. 138–142.

As to the sixteenth and seventeenth instructions asked by appellant, which the court refused to give, these, in effect, would have told the jury that no recovery could be had if the deceased knew before the engine left Oakdale that the safety chains were not fastened.

We have already expressed our opinion as to this. Finding no error requiring a reversal of the judgment in this case, it is affirmed.

---

105 652
a206s 272

North Chicago St. R. R. Co. v. Leah Wellner.

1. INSTRUCTIONS—*Apparent Intelligence or Lack of Intelligence of Witnesses.*—An instruction that the credibility of the witnesses is a question exclusively for the jury; and the law is that where a number of witnesses testify directly opposite to each other, the jury are not bound to regard the weight of the evidence as evenly balanced, merely because of numbers; the jury have a right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor and fairness, their apparent intelligence or lack of intelligence, and from all the surrounding circumstances appearing

on the trial, which witnesses are the more worthy of credit, and to give them credit accordingly, is proper.

2. SAME—*Testimony of Husband in Behalf of Wife.*—An instruction that, under the law of this state, a husband is a competent witness to testify in behalf of his wife in a suit brought by the latter for personal injuries alleged to have been sustained by the wife, that if the testimony of the husband appears to be fair, is not unreasonable, and is consistent with itself, and the witness has not been in any manner impeached, then you have no right to disregard the testimony of such a witness, merely from the fact that he is related by marriage to the plaintiff in the case, is proper.

3. NEW TRIALS—*Will Not be Granted for Purpose of Impeachment.*—A new trial will not be granted for the purpose of introducing evidence by way of impeachment, merely.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge presiding. Heard in the Branch Appellate Court at the October term, 1901. Affirmed. Opinion filed January 30, 1903.

JOHN A. ROSE and LOUIS BOISOT, attorneys for appellant; W. W. GURLEY, of counsel.

RITCHIE, ESHER & KNOBEL, attorneys for appellee.

MR. PRESIDING JUSTICE WATERMAN delivered the opinion of the court.

This was an action to recover damages for personal injuries said to have been caused by the negligence of appellant.

Appellee was, June 2, 1899, a passenger upon one of appellant's cars. In leaving the car on Monroe street near LaSalle, she was thrown to the ground and injured. The principal question in controversy was whether, the car having completed the turn from LaSalle street into Monroe street and stopped, she started to leave the car after it had been started along Monroe street, or whether when she endeavored to leave the car it was standing still. As to this, the evidence was contradictory and irreconcilable. The plaintiff, her husband, and a woman standing at the time on Monroe street, testified for the plaintiff. For the defendant were five passengers upon the car and four of its employes.

Nothing in the testimony given on behalf of the plaintiff is inconsistent with natural law, the ordinary observation of mankind or indicative of a desire to state other than the truth. The same may and perhaps should be said of the testimony given in behalf of the defendant. The plaintiff and her husband were naturally interested witnesses. The incidents of the occasion are likely to be more strongly impressed upon their minds and the mind of the conductor, than upon the other witnesses.

A careful examination of the evidence does not impress us that it so clearly preponderates in favor of the defendant, that we ought to reverse the judgment of the Superior Court. We feel a doubt as to under what circumstances the accident did actually occur.

At the instance of the plaintiff, the court gave to the jury the following instruction:

"The court instructs the jury that the credibility of the witnesses is a question exclusively for the jury; and the law is that where a number of witnesses testify directly opposite to each other, the jury are not bound to regard the weight of the evidence as evenly balanced merely because of numbers. The jury have a right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor and fairness, their apparent intelligence or lack of intelligence, and from all the other surrounding circumstances appearing on the trial, which witnesses are the more worthy of credit and to give them credit accordingly."

Similar instructions are said to have been condemned in C. W. D. Ry. Co. v. Bert, 69 Ill. 388; Eastman v. The W. C. St. R. R. Co., 79 Ill. App. 585; Barron v. Burke, 82 Ill. App. 116; Hope v. W. C. St. Ry. Co., 82 Ill. App. 311.

None of the instructions considered in those cases was like the one under consideration.

In City of LaSalle v. Kostka, 190 Ill. 130, an instruction telling the jury that they had a right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor and fairness, their apparent intelligence or lack of intelligence, and all the other surrounding circumstances appearing on the trial,

which witnesses are the more worthy of credit and to give them credit accordingly, was approved.

Appellant insists that the instruction in effect told the jury that they should believe the more intelligent witnesses. We do not consider it open to such criticism.

From time immemorial in general statements to jurors as to the things which they may take into consideration in determining what witnesses are the most credible, apparent intelligence or lack of intelligence, has been one of the things frequently mentioned. C. & A. R. R. Co. v. Winters, 65 Ill. App. 435; Stampofski v. Steffens, 79 Ill. 303; Fisher v. State, 77 Ind. 46.

Nor was the instruction a singling out of any witnesses or the testimony given by any witness as more worthy of credence than others. It was as applicable to one witness as another. So far as is to be learned from a reading of the record here presented, all the witnesses appear to have been persons of intelligence.

Appellant complained also of the giving of the following instruction:

"The jury are instructed that under the law of this state a husband is a competent witness to testify in behalf of his wife in a suit brought by the latter for personal injuries alleged to have been sustained by the wife. You are instructed that if the testimony of the husband appears to be fair, is not unreasonable, and is consistent with itself, and the witness has not been in any manner impeached, then you have no right to disregard the testimony of such a witness merely from the fact that he is related by marriage to the plaintiff in the case."

The complaint is not that it does not state a correct rule, but that it tended to give a weight to the testimony of the plaintiff's husband which it otherwise would not have had. The testimony of the husband of the plaintiff might properly have been and was likely to be commented upon by attorneys for the defendant as coming from one who could not fail, from his relationship, to feel interested in support of the plaintiff's claim. The instruction did no more than to tell the jury that because of such relationship

his testimony was not to be disregarded. The twenty-eighth instruction, given at the instance of appellant, was to the same effect as to the testimony of its employes.

The court, of its own motion, gave the following instruction:

"If in putting in the evidence, or in argument, counsel for either party has made any statement not based upon the evidence, the jury should wholly disregard such statement."

Counsel for appellant say the effect of this instruction was to cast a slur upon the arguments of counsel and to deprive the jury to a large extent of the benefit that they should derive from a thorough argument of the case in all its bearings by counsel for both parties.

If this be the case, the instruction was, as we understand, harmful only to appellee. It does not appear from the record that the case was argued at all. The statement is made in the brief of appellee that counsel for appellant did not argue the case.

After verdict had been rendered, appellant produced affidavits of many persons to the effect that one of the witnesses for appellee had, six years prior to the trial, been a keeper of a house of ill-fame in Flagstone, Arizona; that such career upon her part had continued up to the time of her marriage to her present husband, six years ago. The witness upon the trial being asked if such were not the case, testified that it was not. It is well settled that a new trial will not be granted for the purpose of introducing evidence by way of impeachment merely. C. & N. W. Ry. v. Calumet Stock Farm, 194 Ill. 9.

Nor would the affiants upon another trial be permitted to testify to that contained in their respective affidavits. Gifford v. The People, 87 Ill. 210.

The judgment of the Superior Court is affirmed.

James A. Davis v. Miller Signal Co.

1. MANDAMUS—*There Must be a Clear Case.*—In a mandamus proceeding, where the right of the relator to the writ is doubtful or where there is a substantial doubt as to its being the legal duty of the respondent to perform the act, the writ will not issue. The remedy by mandamus rests upon the legal rights of the relator and upon the legal obligations and duties of the respondent. It can not be predicated solely upon equities existing between the parties.

2. SAME—*Equitable Defense Can Not be Set Up as Against a Plain Legal Right.*—In a proceeding for mandamus a purely equitable defense can not be set up as against a plain legal right.

3. LIS PENDENS—*Three Things Essential to the Doctrine.*—Three things are essential to the doctrine of *lis pendens:* First, the property must be of a character to be subject to the rule of *lis pendens;* second, the court must have jurisdiction, both of the person and the *res;* third, the *res* must be sufficiently described in the pleadings.

4. SAME—*Defined.*—As a general rule *lis pendens* is, in law, notice of any fact averred in the pleadings pertinent to the matter in issue or the relief sought, and of the contents of exhibits filed and made a part of the pleadings; but in order that the notice may attach, the property involved must be so pointed out in the proceedings as to warn the public that they intermeddle therewith at their peril.

5. SAME—*Does Not Apply to Sales of Stock.*—Although the doctrine of *lis pendens* does extend sometimes to personal property under certain actions concerning the same, it does not apply to sales of shares of stock had during the pendency of a suit concerning the same.

Bill for an Injunction.—Appeal from an interlocutory injunction in the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge presiding. Heard in the Branch Appellate Court at the March term, 1902. Injunction modified and as modified affirmed. Opinion filed January 16, 1903. Rehearing denied February 3, 1903.

CHARLES H. ALDRICH and LORENZO C. BROOKS, attorneys for appellant.

W. H. LYFORD and J. B. MANN, attorneys for appellee; E. H. SENEFF and R. B. MASON, of counsel.

MR. PRESIDING JUSTICE WATERMAN delivered the opinion of the court.

This is an appeal from an interlocutory order of injunc-

tion. The bill upon which this order was made contained, among other things, the following:

"That after said stock of your orator, acting under the name of the Co-operative Railway Signal Company, had been issued, the owners of a large number of shares of said stock turned the same over to your orator to be placed in your orator's treasury and to be sold or used in carrying on the business of your orator, which said shares of stock so turned into thetreasury of your orator and to be by it used for the purpose aforesaid, included the one hundred and fifty shares hereinafter mentioned; that while one hundred and fifty shares of said stock so turned over to your orator for the purpose aforesaid was in the possession of your orator under the agreement and understanding aforesaid, one J. J. Tobias, who was then its secretary, on the 16th day of February, A. D. 1901, delivered to one James A. Davis, a certificate for one hundred shares of said stock, and on the 28th day of February, A. D. 1901, delivered to said Davis a certificate for fifty shares of said stock, said certificate for one hundred shares being numbered nine, and said certificate for said fifty shares being numbered one hundred and one; that said certificates and each of them were delivered by said J. J. Tobias to said James A. Davis without any authority from your orator or from its board of directors so to do, and without any consideration therefor moving to your orator or to any one for it or in its behalf, and that if said stock was delivered to said Davis otherwise than as a gift from said Tobias, it was delivered in payment of a private obligation from said Tobias to said Davis; that after it was discovered by the board of directors of your orator that said shares had been so delivered to said Davis, the said board declared said issue of stock to have been unauthorized and repudiated the same; that as between your orator and said James A. Davis, the said shares of stock were fraudulently issued and the same should in equity be delivered up to your orator to be canceled; that said James A. Davis, in fraud of the rights of your orator, is now claiming to be the owner of said one hundred and fifty shares of said stock, and is claiming the right of a stockholder of your orator, and for the purpose of annoying your orator and prying into its business affairs, had begun and is now maintaining a certain proceeding of mandamus in the Superior Court of Cook county, Illinois, against your orator and its president and secretary, to compel your orator and its said offi-

cers to permit him, said Davis, and some person styled an expert accountant, to examine the books, papers and records of your orator, which said proceeding of mandamus is case number 220,530 on the docket of said Superior Court, and is entitled James A. Davis v. Miller Signal Company, H. V. Miller and T. M. Bates; that said James A. Davis and one Cassius M. Upton, together with others to your orator unknown, have entered into a conspiracy to use the said void stock held by Davis for the purpose of ascertaining the business secrets of your orator in order that they may use the knowledge so obtained for their own private interests, and to the injury of the business of your orator; that unless restrained by the order of this honorable court from further prosecuting said suit for a writ of mandamus, said James A. Davis will put your orator to great expense and annoyance, and that the question as to the right of your orator to have said 150 shares of stock surrendered and canceled will not be determined until the hearing of this cause, wherein all rights of your orator and said James A. Davis in said shares of stock, can be alone settled and adjudged; that unless, pending the hearing of this cause, said James A. Davis and those acting with him be temporarily enjoined and restrained from disposing of said shares of stock, there will be great danger that he may in fact or pretendedly place said shares in the name of a third person, who may be, or pretend to be, an innocent holder of the same; that if notice is given to said James A. Davis of the application for a temporary injunction herein, your orator believes that he, said Davis, will put said shares of stock into the name of some third person; that there is nothing in the records, books or papers of your orator which it has any desire or purpose of concealing from any of its stockholders, and which can not be known to any of its stockholders, but that it has on foot certain business transactions and proposed business transactions which should not be now made known to others than those having a pecuniary interest in its affairs, and especially should not be made known to persons who are hostile to it and to its interests."

The temporary injunction granted was in accordance with the following prayer therefor:

"Your orator further prays that pending the final hearing of this cause, your honors will cause to be issued out of this honorable court, the people's writ of injunction restraining said James A. Davis from in any manner further prosecuting said proceeding for a writ of mandamus and from in

any manner selling, assigning, transferring or disposing of said 150 shares of stock or any portion thereof, and from in any manner asserting or attempting to assert, any rights as a pretended shareholder in your orator company."

Appellant raises numerous objections to the bill, on account of which he insists that the temporary injunction granted by the court below should be set aside.

Among other things, appellant says that by the bill it appears that not only is appellee guilty of laches, but that it has a plain and adequate remedy at law, also that the bill is insufficient, uncertain, vague, indefinite, does not sufficiently state the nature, subject, purposes and details of the business secrets alleged to be in danger of expqsure if the defendant is permitted to examine its books and records. Sixteen alleged reasons for the setting aside of this injunction are elaborately and ably argued by appellant. The condition of the pleadings in the mandamus suit under which appellant insists appellee has an adequate remedy is not shown. That which appears from the bill as to the mandamus suit is that appellant has begun and is now maintaining a certain proceeding of mandamus in the Superior Court against appellee, its president and secretary, to compel it and its officers to permit him, appellant, and some person styled an expert accountant, to examine the books, papers and records of the complainant.

The only purpose and all sought in such proceeding, so far as is shown by the bill, is merely to obtain for appellant and an expert accountant an opportunity to examine the books, papers and records of appellee. Such claim, it inferentially appears from the bill, is based upon appellant's instance that he is a stockholder of appellee. That appellant is the holder of certificates for 150 shares of the stock of appellee in due and proper form delivered to him by appellee's secretary is asserted in the bill, and therefrom it appears that the only defense which appellee has to the mandamus proceeding is the claim set up in the bill filed by it; that the said stock certificates were delivered by its secretary to appellant without consideration, so far as appellee is concerned, in fraud of its rights; in other words,

that the certificates of stock were fraudulently obtained by appellant.

The defense of appellee to the mandamus proceeding, if any it has, appears to be of an equitable nature, as upon the face of the certificates he holds, appellant is a stockholder and the signatures of its officers, upon such certificates are genuine.

In Spelling on Injunctions and Other Extraordinary Remedies, Sec. 1370, it is said: "Nor will the court in a mandamus proceeding determine conflicting equities between the parties, and where they remain unsettled until the final hearing, relief will be refused."

In a mandamus proceeding, where the right of the relator to the writ is doubtful or where there is a substantial doubt as to its being the legal duty of the respondent to perform the act, the writ will not issue. The remedy by mandamus rests upon the legal rights of the relator and upon the legal obligations and duties of the respondent. It can not be predicated solely upon equities existing between the parties. State ex rel. Patterson v. Wenzel, 75 N. W. Rep. 579.

It follows that in a proceeding for mandamus a purely equitable defense can not be set up as against a plain legal right. Appellant urges that appellee is not in danger of loss from a transference by him of the shares of stock to a *bona fide* purchaser, because of the pendency of the mandamus proceeding, which it is claimed is *lis pendens* to all the world.

As before stated, it does not appear from the bill, the allegations of which are alone to be considered in determining its sufficiency to authorize the injunction awarded thereon, that any answer has been made to the petition for mandamus. The only thing, therefore, that appears therefrom is that appellant is claiming the right as a stockholder to examine the books, papers and records of appellee. This, it may be contended, is notice of appellant's claim to this stock, but we fail to see how it is notice of appellees.

Three things are essential to *lis pendens;* first, the property must be of a character to be subject to the rule of *lis*

pendens; second, the court must have jurisdiction, both of the person and the *res;* third, the *res* must be sufficiently described in the pleadings. As a general rule *lis pendens* is, in law, notice of any fact averred in the pleadings pertinent to the matter in issue or the relief sought, and of the contents of exhibits filed and made a part of the pleadings; but in order that the notice may attach, the property involved must be so pointed out in the proceedings as to warn the public that they intermeddle therewith at their peril. Bennett on Lis Pendens, Secs. 91 and 92.

The bill with sufficient certainty and clearness states that the stock in question was fraudulently obtained by appellant through the collusion and breach of faith of appellee's secretary. There is made out upon the face of the bill that appellee is clearly entitled to have the certificates of stock canceled, and, pending the determination of the questions involved in this case, an injunction to prevent appellant's transferring the stock for a valuable consideration to some person who may take it in entire ignorance of the fraud charged in the bill.

Undoubtedly the doctrine of *lis pendens* does extend sometimes to personal property under certain actions concerning the same. In Holbrook v. New Jersey Zink Company, 57 N. Y. 616, as well as in Leitch v. Wells, 48 N. Y. 586, it was held that the doctrine of *lis pendens* does not apply to sales of shares of stock had during the pendency of a suit concerning the same. See also Cook on Stockholders, Sec. 362.

After the filing of the bill and the making of an order for an injunction, leave was given appellee to amend the bill on its face by changing the name of defendant, John A. Davis to James A. Davis, and thereupon it was ordered that a writ of injunction issue in accordance with the prayer of the bill as filed. The bill was not resworn after such amendment and this omission, appellant claims, is fatal to the injunction. The amendment was manifestly inconsequential, as there was no change of any actual party defendant, but merely a correction in the statement of the christian name of one of the defendants.

In Gregg v. Brower, 67 Ill. 530, the court say:

"The rule, however, requiring a material amendment to a bill originally sworn to, also to be sworn to, we do not think has been relaxed in our practice; in mere matters of form it can be relaxed and has been. The amendment in question, as we have said, was material, changing, as it did, or rather adding to the liability of the appellant when the bill was filed and the pleadings made up, although the bill was in particular for an injunction. The equity of the parties was not changed by the injunction. The equity of the parties was not changed by the facts stated in the amendment."

The court declined to sustain the appellant's contention in that case that as the bill was exhibited under oath, the amendment should have been sworn to; and affirmed the decree.

To the same effect is Gordon v. Reynolds, 114 Ill. 118. Appellant, as appears from the record, abstract and brief, after such amendment, filed in this case a special demurrer to the whole bill and thereafter answered the same, without, so far as appears, raising any question as to such amendment. The injunction was, as appellant urges, too broad, and must be modified by striking therefrom the concluding clause of the injunction order restraining appellant from in any manner asserting or attempting to assert any rights as a pretended shareholder of the stock of appellee. Otherwise the order of the Circuit Court granting a temporary injunction will be affirmed.

Injunction modified and order as modified affirmed.

A. C. Terry et al. v. Chicago Packing & Provision Company et al.

1. CORPORATIONS—*Legality Can Not be Attacked Collaterally.*—The legality of a *de facto* corporation can not be inquired into collaterally.

Bill for Dissolution of a Corporation.—Error to the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge presiding. Heard

in the Branch Appellate Court at the March term, 1902. Affirmed. Opinion filed February 18, 1903.

HOLMES, LYNN & SHIRRA, attorneys for plaintiffs in error.

MORAN, MAYER & MEYER, attorneys for defendants in error; LEVY MAYER, of counsel.

MR. PRESIDING JUSTICE WATERMAN delivered the opinion of the court.

In this case an amended and substituted bill of complaint was filed against the Chicago Packing and Provision Company, a corporation created under the laws of Illinois; the American Trust and Savings Bank, a corporation of Illinois; E. H. Pearson, D. S. Googins, Gilbert C. Pryor, William J. Dee, Granger Farwell and Francis Beidler, director of the Chicago Packing and Provision Company; and William J. Dee, Henry Botsford, Charles L. Hutchinson, William L. Greggson, Gilbert C. Prior, Granger Farwell, J. H. Pearson and E. H. Pearson, and C. H. Deere; and "the so-called Chicago Packing and Provision Company, Ltd."

To this a general demurrer interposed by the defendants was sustained. The bill, among other things, sets up proceedings had in what it terms an attempt to organize in England the "so-called" Chicago Packing and Provision Company, Limited, under an act of Parliament known as "Companies' Act," which proceedings are declared in the bill to have been pretenses by certain persons termed promoters.

It is said these promoters having attempted to incorporate the "Chicago Packing and Provision Company, Limited," pretended to elect a board of directors of said company, and said pretended directors entered into a contract for the transfer to said corporation, so organized, of property of various descriptions and great value and issued stock of such company, both preferred and common, to a large amount, and caused such stock to be listed upon the Chicago Stock Exchange and proceeded to carry on extensive business in Chicago and other places. The bill further

charges that the pretended English corporation never complied with the laws of Illinois.

The bill also sets forth that the entire scheme of the organization of said "pretended" English corporation and the management of its business subsequent to the 9th day of July, 1890, was in fraud of the laws of Illinois, and in fraud of the right of complainant and others, and in fraud of the laws of Great Britain; that such corporation is not entitled to be recognized as a corporation; that it has never exercised corporate functions, except as the representatives of the promoters, who, professing to act as directors, have held annual meetings, and pretended to elect officers.

The prayer of the bill, among other things, is that the attempted corporation of the Chicago Packing and Provision Company, Limited, be declared fraudulent and void, and it be treated as a dummy; that the property of the Chicago Packing and Provision Company of Illinois be declared the joint property of all holders of stock certificates without any preference or priority. From other portions of the bill it is manifest that the holders of stock certificates mentioned are the holders of stock certificates of the Chicago Packing and Provision Company, Limited.

There is also a prayer that Granger Farwell be restrained from disposing of the assets of the Chicago Packing and Provision Company and be required to turn the same over to a receiver to be appointed. The bill charges that the assets and property of the Chicago Packing and Provision Company, of great value, were acquired and transferred to the so-called Chicago Packing and Provision Company, Limited.

Very voluminous briefs have been filed in the case, some of which ask the court to take a position in this matter, the suggestion of which is startling; the court being asked to, like a "hardy pioneer," "blaze its way" through the wilderness of fraud and chicanery charged in the bill, without reliance upon precedents or practice that can be found in any adjudicated case. The reply brief of complainant in error contains the statement that if this court

shall be of the opinion that this bill is a collateral attack by stockholders upon a *de facto* corporation, counsel for complainants is prepared to admit and does admit that the action will not lie and that the demurrer to the bill was properly sustained.

We are of the opinion that this is a collateral attack upon a *de facto* corporation and that consequently the action will not lie and that the demurrer to the bill was properly sustained. A complainant can not escape the effect of the complaint, statements and prayer of his bill by calling a corporation whose property he seeks to have taken away from it, and its stockholders treated, not as such, but as partners—by calling the defendant a *pretended* corporation, or that done toward incorporating, a *pretended* attempt to incorporate, or designating the action had in the name of the corporation a *pretended* action as a corporate body. Story's Equity Pleadings, Sec. 28, 29, 251, 252, 255, 256, 257; West v. Schnebly, 54 Ill. 523.

If the complainant does not desire and does not intend, by his bill, to make a collateral attack upon the existence of the Chicago Packing and Provision Company, Limited, as a corporate body, it is easy for him to recognize its corporate existence. If, on the other hand, he wishes to sue as individuals a number of persons who have been acting in the name of and as a corporate body, it is not difficult to directly charge them with having acted as partners, and being responsible as such, for all they have done. The charge that no such corporation as the Chicago Packing and Provision Company, Limited, has ever existed, or ever acquired or had possession of any of the property and assets which the complainants seek to have placed in the hands of a receiver and distributed to various persons, may be easily made. The decree of the Circuit Court is affirmed.

Edward W. Hillis v. Elizabeth Asay.

1. VOLUNTARY ASSIGNMENTS—*No Other Court Can Interpose When the Jurisdiction of the County Court Has Once Attached.*—In the matter of voluntary assignments, when the jurisdiction of the County Court has once attached, no other court has the right to interpose, for the purpose of adjusting any claims with respect to the property assigned or of administering the insolvent's estate, except, perhaps, under special circumstances a court of equity may intervene to prevent a failure of justice. In cases of concurrent jurisdiction the court which first obtains it will have precedence.

2. SAME—*Assignee is a Trustee for Creditors.*—Under a voluntary general assignment for the benefit of creditors the assignee becomes a trustee for the creditors and the assignment creates a trust relation.

3. SAME—*Degree of Care to be Exercised by Assignee.*—All that the law requires of the assignee is that he use ordinary and reasonable diligence in the execution of his trust. If any portion of a stock in his care is stolen he will not be responsible for the loss, unless it can be shown that it was through his culpable negligence.

Replevin.—Appeal from the Circuit Court of Cook County; the Hon. GEORGE W. BROWN, Judge presiding. Heard in the Branch Appellate Court at the March term, 1902. Reversed. Opinion filed February 13, 1903.

JAMES A. PETERSON, attorney for appellant.

W. S. NEWBURGER, attorney for appellee; BENJAMIN LEVERING, of counsel.

MR. JUSTICE FREEMAN delivered the opinion of the court.

This is a replevin suit brought by appellee to recover two seal-skin capes which it is alleged were wrongfully taken and detained by appellant. The declaration contains three counts, the first two of which charge the wrongful taking and detention, and the third is a count in trover. The property was not recovered on the replevin writ, and upon the trial, judgment was rendered upon the verdict of the jury in favor of appellee for $325.

It appears from the evidence that James W. Bishop, doing business as J. A. Bishop & Co., made an assignment on the 7th day of November, 1898, to appellant, Hillis.

Prior to the time of such assignment appellee claims to have left at the store of Bishop & Co. two seal-skin capes to be made over into a seal-skin coat, for which alterations she states she agreed to pay Bishop & Co. $65. It is claimed that the garment was lost or stolen and this action is brought against appellant individually to recover the alleged value of the coat.

Appellee's testimony is to the effect that three weeks after she left the material with Bishop & Co., she called and had the coat fitted, and three days before the assignment she was there again and tried on the coat. The next time she called she found the place closed and in appellant's possession as assignee. She saw Bishop, who sent her to appellant. She says the latter told her the coat had been in his possession, but was missing. It is not necessary to recite her testimony, but while she states that the coat was in appellant's possession, it is evident that she has no personal knowledge as to whether it ever was or not. She assumes that it was, because, as assignee, he was in possession of the property of Bishop & Co. covered by the deed of assignment. There is no evidence that appellant in person ever saw the missing garment or had anything to do with it. Appellee dealt wholly with Bishop in relation to the coat, both before and after the assignment, except that she had a conversation with appellant. She says that Bishop told her the garment had been brought into the store after the assignment and was there on a table; that when he turned around it was gone. One of plaintiff's witnesses, an employe in the store, testifies that after appellant took possession as assignee, she saw the garment in question lying on a table in the store of the assignor and had a conversation with Mr. Bishop, telling him that she better put it away, to which Bishop replied, "Never mind, leave it there; she will be in, perhaps, in an hour or so to have a fitting." That was the last the witness saw of it.

Appellant testifies that he never saw the garment, that it never came into his personal custody or possession, and in this he is in no way contradicted. He says he told appel-

lee when she called on him that he could do nothing about it without an order of court, and if the court should order him to give her a jacket in place of the one missing, he would have to do it, but that he was in no way personally responsible for its loss.

Appellee's attorneys introduced in evidence the deed of assignment from Bishop & Co. to appellant. It is conceded that the coat in controversy was brought to the store after the assignment and before appellant as assignee had moved the stock of goods assigned to him, out of the store which had been occupied by the assignor. The employes there at that time were in his employ as assignee. There was a charge of $65 due from appellee before she was entitled to possession of the garment. This money was due to the estate of Bishop & Co., and to appellant only in his capacity as assignee of that estate. If appellant had possession of the garment pending payment of the bill for alterations, his possession was that of an assignee. The lien of Bishop & Company for the charges had been transferred to appellant by the assignment. It is well settled law that he could not be sued in the Circuit Court in replevin or trover for property which came into his possession as such assignee. The County Court having acquired jurisdiction, the Circuit Court had no right to interfere. Hanchett v. Waterbury, 115 Ill. 220; Colby v. O'Donnell, 17 Ill. App. 473; Freydendall v. Baldwin, 103 Ill. 325–329.

In the first of the above cases, a replevin writ was sued out against an assignee for the recovery of certain goods, embraced in an assignment under the insolvent debtor's act. The County Court having jurisdiction of the assignment entered an order restraining the sheriff from executing a writ of replevin, and the Supreme Court said (page 229): "What we intend to hold, and do hold, is, that in the matter of voluntary assignments, when the jurisdiction of the County Court has once attached, no other court has the right to interpose, for the purpose of adjusting any claims with respect to the property assigned or of administering the insolvent's estate, except, perhaps, under special circum-

stances a court of equity may intervene to prevent a failure of justice. In thus holding we simply recognize and give effect to the familiar and long established rule that in cases of concurrent jurisdiction the court which first obtains it will have precedence." It is true that in the cases referred to, the parties who sued out the replevin writs claimed to be owners of a part of the goods covered by the assignment, and in this case it is claimed that the coat in question was not a part of the property covered by the assignment, but came into the possession of the assignees subsequently, as bailee. If, however, appellant, as assignee, was entitled to receive and hold the coat until the charges of Bishop & Company should be paid, then it was in his possession as assignee, and the rule as above stated should be applied. If, on the other hand, it is sought to charge him with personal liability as bailee, then it should appear that either he or some one authorized in his personal behalf received the coat in controversy and wrongfully detains it or has wrongfully permitted it to be lost or stolen. There is no such evidence in this case. The coat was received by Bishop and there is no evidence that the latter had any authority to represent or act for appellant in any personal matter. So far as appears, Bishop had no more authority to so act in receiving the coat than he had to sign or indorse a note in appellant's name.

Under a voluntary general assignment for the benefit of creditors the assignee becomes a trustee for the creditors and the assignment creates a trust relation. (Bradner Smith & Co. v. Williams, 178 Ill. 420–424.) In Hanchett v. Waterbury, *supra*, it is said that "the assignee's relation to the court is analogous, in some respects, to that of a receiver, or of an assignee in bankruptcy." Suits against receivers "are really and substantially suits against the fund or property of which they are custodians. They represent the property or fund. If judgment be against them the court orders it to be satisfied out of the fund or property." McNulta v. Lockridge, 137 Ill. 270–281. In Johnston v. Keener, 23 Ill. App. 220–223, it is said: "If any

portion of the stock was stolen, the receiver would not be responsible for the loss, without it could be shown it was through his culpable negligence. * * * All that the law required of the receiver was that he should use ordinary and reasonable diligence in the execution of his trust." Applying these principles to the case of an assignee, a judgment against him as such, would have to be satisfied out of the property in his hands as assignee, and such matters are, as we have said, subject to the summary jurisdiction of the County Court. An action in replevin or trover will not lie. This case, therefore, had no business in the Circuit Court, and that court had no jurisdiction to render the judgment complained of.

Objection is made that the damages are excessive. This may be true. But in view of the conclusions stated it is not necessary to consider other alleged errors. The judgment of the Circuit Court is reversed, with a finding of facts.

Anna Holdroff v. Ferdinand F. Remlee.

1. ELECTION—*To Declare Principal Note Due for a Breach of Condition—Notice.*—Where a trust deed provides that the legal holder of the indebtedness may, at his option and without notice, declare the principal note due and payable for a breach of any of its conditions, the filing of a bill to foreclose the trust deed is a sufficient declaration of the option to declare the principal note due, and no formal declaration to that effect is necessary.

2. CHANCERY PRACTICE—*Objection to Master's Report Must be Specific.*—Objections and exceptions to a master's report must be specific in order to avail an appealing party in a court of review.

Bill to Foreclose a Trust Deed.—Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge presiding. Heard in this court at the March term, 1902. Affirmed. Opinion filed February 9, 1903.

JOHN C. WILSON, attorney for appellant.

KOEHLER & WILDER, attorneys for appellee.

MR. JUSTICE WINDES delivered the opinion of the court.

Appellee filed his bill June 12, 1901, to foreclose a trust deed securing a principal note of $2,600 made by appellant, dated January 26, 1899, payable to appellee three years after its date, with interest at six per cent per annum, payable half-yearly until its maturity on January 26th and July 26th, each year, and seven per cent per annum after maturity, the interest installments being evidenced by six interest notes of $78 each, which respectively bear interest at seven per cent per annum after their maturity. The trust deed, among other things, provides that on a breach of any of its conditions, the whole of the indebtedness, including principal and all earned interest, should become immediately due and payable, at the option of the legal holder thereof, without notice. The bill alleges that appellee, at the filing of the bill, was the legal owner and holder of the principal note, trust deed and an unpaid interest note on said principal note, which is marked "Exhibit C," and is attached to the bill. This interest note is for $78 and matures January 26, 1901. The bill also alleges that there is due to appellee the amount of the principal note with interest thereon at seven per cent per annum from January 26, 1901.

Appellant answered the bill, the cause was referred to a master, who took evidence and reported to the court, finding due to appellee, including solicitor's fees of $250, $3,044.80. On a hearing of exceptions to the report by the chancellor, the solicitor's fees were reduced to $150, and in all other respects the report was approved and a decree of sale entered.

It is claimed by appellant that the bill alleges no default nor election by the legal holder of the indebtedness to declare the principal note due and payable, and therefore it was error for the court to enter the decree it did.

The allegation, as is stated above, shows there was an unpaid interest note due January 26, 1901, of which appellee was the legal owner and holder. This note, which is attached to the bill was, when the bill was filed, overdue

more than four months, and taken in connection with the allegation, sufficiently shows a default.

The trust deed, as we have seen, provides that the legal holder of the indebtedness may, at his option and without notice, declare the principal note due and payable for a breach of any of its conditions. One of its conditions was to pay the said interest note at its maturity, which was not done. The filing of the bill was a sufficient declaration of his option to declare the principal note due, and no formal declaration to that effect was necessary. Heffron v. Gage, 149 Ill. 190; Brown v. McKay, 151 Ill. 323; Princeton Loan & T. Co. v. Munson, 60 Ill. 371; Cundiff v. Brokaw, 7 Ill. App. 147; 2 Jones on Mortgages, Sec. 1182.

In the section cited from Jones, the author, in speaking of the mortgagee's election to consider the whole debt due, says: "His proceeding to enforce the mortgage sufficiently shows his election." This seems reasonable as applied to the case at bar, and is supported by the cases cited. In the Brown case, *supra*, in which the option to declare the principal sum due was not provided, as in this case, that it should be without notice, the court say:

"The determination on the part of the holder of the notes to file a bill for the foreclosure of the trust deed, for the entire indebtedness, and causing the same to be prepared and filed in pursuance of such determination, was a sufficient election to declare the whole sum due, and to entitle him to maintain his bill."

The facts alleged in the bill, to which we have referred, and which were proved on the hearing, show appellee's right to declare the principal sum due. The bill alleges that the principal note was due, and it seems useless to have alleged in addition to this and the other facts stated that he elected to declare the principal note due. Equity will not require a useless thing to be done.

Appellant places special reliance upon the case of Wheeler v. Foster, 82 Ill. App. 153–6, but we think the case is not controlling, and, if it sustains appellant, we think is not supported by authority. What was averred in the bill

in that case does not appear from the report, and the court decides only "that a party can not aid his pleadings by his proofs," and does not hold expressly that the bringing of suit was not an election to declare the principal sum due.

Moreover, there is no specific objection to the master's report nor exception thereto upon the hearing before the chancellor, which points out the lack of any particular allegation in the bill. The only objection and exception in this regard is: "Said master's report and conclusion are not supported by the allegations of the bill of complaint." It is well settled that objections and exceptions to the master's report must be specific in order to avail an appealing party in a court of review. The objection and exception are too general. Had they been specific, the bill might have been amended.

Appellant claiming no other cause of error in his argument, we are of opinion that the decree of the Superior Court should be and it is affirmed.

TOPICAL INDEX, VOL. 105.

A

ABATEMENT—Pleas in 485

ACCOUNT STATED—Sent to defendant in the usual and customary way 615

ACTIONS—Given to personal representatives of deceased for death by negligent act 1
Nature of cause of action is shown by declaration 481

ADMINISTRATION OF ESTATES—Beneficiaries should contribute to the payment of debts of the estate *pro rata* 28
Refunding bond after expiration of two years allowed by statute for exhibit of claims 369
Refunding bonds 369

ADMINISTRATOR—Term construed 1
Right and authority to control and settle suits 1

ADULTERY—Several statements taken together charging plaintiff with, is slander 9

AFFIDAVIT OF MERITS—Extension of time in which to present an amended affidavit 117
Plea to declaration supported by 117

ALIMONY—Defined 182
Order to pay for support of child is not 182

APPEALS—Only persons who are parties to the judgment appealed from need be summoned 625
From judgment rendered by a person possessing no judicial powers 46
Under Sec. 58 of the levee act 28

APPELLATE COURT PRACTICE—Pleas in abatement 485
Verdict manifestly against the weight of the evidence 518
Right of prevailing party where court is asked to set aside a verdict 615
May always consider the sufficiency of evidence to support the verdict 462
Where the judgment has been erroneously entered 638
Duty to set aside verdicts which are the result of passion and prejudice 168
Must review correctness of instructions notwithstanding no motion for a new trial appears in bill of exceptions 65

ATTACHMENT—Waiver of tort by bringing action in 196

B

BANKRUPTCY—Section 70 (e) of the national bankruptcy law.. 414
Purpose of section 57 (e) of the national bankruptcy law..... 414
Section 11 (b) and (c)..... 414
Order upon a father to support his child of tender years..... 182
Order to reimburse a stranger for past support of child is discharged by..... 182
BANKS AND BANKING—Custom will not excuse a collecting bank from exercising all reasonable diligence..... 224
Particular custom of bank must be known to customer to be binding upon him..... 224
Banker must use ordinary care in making loans..... 52
BENEFIT CERTIFICATES—*Prima facie* case in suit on..... 267
BILL OF EXCEPTIONS—Appellate Court must review instructions even where no motion for a new trial appears in..... 65
BILLS AND NOTES—Indorser coming again into possession of note..... 155
BOARD OF TRADE—Power of courts to review finding of the board of directors..... 373
BREACH OF PROMISE—Evidence of seduction admissible in... 249
Damages in actions for..... 249
BURDEN OF PROOF—Upon railroad company to show due care to prevent setting fires by sparks..... 67
Upon defendant to meet a *prima facie* case..... 267
Upon one claiming a forfeiture..... 283
BY-LAWS—Courts will not interfere to control enforcement..... 290
Section 6 of rule 20 of the board of trade illegal..... 373
Must be authorized by charter..... 373

C

CARRIER OF PASSENGERS—Care to be exercised for the protection of persons alighting from and boarding trains at stations..... 16
CAVEAT EMPTOR—Applies to judicial sales..... 130
Sales..... 107
CERTIORARI—Officer's return as to service is conclusive..... 611
CHANCERY JURISDICTION—County Court has not conferred upon it any general chancery jurisdiction..... 48
CHANCERY PRACTICE—Power of trial court upon case being remanded..... 618
Objection to master's report must be specific..... 671
CHARTERS—Must authorize by-laws..... 373
What powers are conferred upon corporation by..... 373
CHATTEL MORTGAGES—What must be shown in order to impeach..... 634

CIRCUMSTANTIAL EVIDENCE—Instructions..... 104
CITIES AND VILLAGES—Right under police power to require railroads to elevate tracks..... 217
Act of May 10, 1901, in regard to disconnecting territory from city..... 116
Granting privileges of streets to telephone company need not be by ordinance..... 146
Company given license to operate telephone system in streets has a vested right therein..... 146
CITY CHARTERS—Provisions repealed by state constitution..... 46
COMMISSIONS—Person procuring customer in response to an offer of a broker to divide his commission must show acceptance by both upon conditions of offer..... 255
COMMON CARRIERS—Operator of a passenger elevator is liable as 544
Have no right to change freight rate after the shipping contract is made..... 89
Have a right to restrict liability..... 54
Have a right to limit time for presenting claims..... 54
CONDEMNATION—Extension of street across railroad—What right the city acquires..... 137
CONSIDERATION—Mutually executory contracts may be abrogated by agreement of the parties without..... 426
CONTRACTS—Carrier has no right to change freight rate after shipping contract is made..... 89
Defaulting party liable for increased cost of obtaining material elsewhere..... 126
Mutually executory, may be abrogated by agreement without consideration..... 426
Tender of books under..... 427
A mere offer does not constitute..... 255
Rules of construction..... 326
Prior parol agreements can not vary the terms of the written contract..... 326
Rules of contract apply to payment of rewards..... 255
Mechanic's lien..... 358
Can be rescinded only where a substantial restoration can be made..... 536
Destructive effect of fraud upon..... 373
CONVEYANCES—How construed..... 136
What the consideration is presumed to include..... 136
What must be shown to impeach..... 433
CORPORATION ACT—Who may file bill under section 25 of.... 272
Liability of stockholders under section 25..... 272
CORPORATE NAMES—Section 220 of the criminal code..... 525
CORPORATIONS—Can not be deprived of property without a hearing..... 604
What must be shown to establish a corporation *de facto*..... 604

CORPORATIONS. *Continued.*
For what purposes they may be formed 604
How the question of legal organization may be determined ... 604
A contractor to pay a director will not be implied against a corporation 238
What powers are conferred by charter 373
Right to the use of its name 525
Specific performance of an agreement to organize 495
Legality can not be attacked collaterally 663
COSTS—Construction of word, as used in municipal incorporation law 353
COUNTY COURT—Has not conferred upon it any general chancery jurisdiction 48
Power to settle and distribute the personal estate of deceased persons 49
COURTS—Mere form of application is not material 49
Presumptions that their proceedings are regular 367
CRIMES—Equity will restrain one who seeks to avail himself of .. 373
CROPS—Measure of damages for destruction 209
CUSTOM—Will not excuse a collection bank from exercising all reasonable diligence 224
Particular custom of bank must be known to customer to be binding upon him 224

D

DAMAGES—Caused by public improvement 97
Plaintiff not entitled to damages for mere humiliation or mental annoyance 579
In actions for breach of promise of marriage 249
When $5,000 is not excessive 647
Must be based upon actual conditions 204
DEBTOR AND CREDITOR—Conveyance to defraud creditors 99
Right to prefer creditor 634
DEDICATION—Of a public street across a railroad right of way—What rights public takes 137
A question of fact 65
DEEDS—May be shown to be mortgages 283
DEMAND—Of payment of promissory note—When necessary 626
Promissory note made payable at a particular place 626
DIRECTORS—Of corporations—Contract to pay will not be implied 238
DIVORCE—Reversal of decree of Circuit Court does not affect order to pay solicitor's fees 363
DRAM-SHOPS—Keeper liable to child deprived of support through liquors sold to the father 73

E

EASEMENTS—Of public in railroad right of way..... 217
ELECTION—Inconsistent remedies must be co-existent..... 490
To declare principal note due for a breach of condition..... 671
EQUITY—Party seeking equity must do equity..... 640
Follows the law..... 271
Will not generally restrain the erection of a building upon one's own property..... 559
Will restrain one who seeks to avail himself of a crime..... 373
EQUITY JURISDICTION—Over the subject of nuisances..... 560
Will give affirmative or defensive relief..... 536
EQUITY PRACTICE—Due weight should be given to the conclusion of the master..... 283
Where finding of the master has been approved by the chancellor..... 283
Chancellor may submit questions of fact to a jury..... 180
ESTOPPEL—By statements as to cause of death in proofs of death..... 267
EVICTION—Defined..... 585
EVIDENCE—Of value of goods should be given independently of memorandum..... 89
Province of jury where it is conflicting.....96, 261
Supporting a verdict—Slander..... 114
Inadmissible to prove that other animals sold at the same sale were sound..... 104
Objection to, does not relate to errors in settling pleadings.... 75
Writing exhibited to opposite party during controversy..... 43
Where it is conflicting it is the jury's province to find the truth..... 30
Burden of proof upon defendant to meet a *prima facie* case.. 267
What is admissible in actions *ex delicto* under the general issue..... 1
Instructions where it is conflicting..... 123
As to merely possible future conditions..... 204
Of conditions of defective sidewalk subsequent to injury..... 191
That another person has subsequently been injured by a defective sidewalk..... 191
Photographs, when admissible..... 191
Of seduction admissible in action for breach of promise of marriage..... 249
To support the verdict—Appellate Court may always consider the sufficiency of..... 462
Upon which a recovery is asked—Where it is slight..... 462
Where it is evenly balanced..... 462
Verdict manifestly against the weight of..... 518
Character of newly discovered evidence to warrant a new trial..... 545

EVIDENCE. *Continued.*
Merely cumulative evidence no ground for a new trial..... 545
Province of the jury to determine the preponderance and credibility of..... 615
Certificate of redemption competent to show sums paid for redemption from tax sales..... 589
Showing necessitous condition of widow and next of kin in actions for death by negligent act..... 566
When sufficient to support verdict, it will not be reversed.... 102
Of condition of engine during preceding winter..... 25
EXEMPLARY DAMAGES—In libel..... 170
EXPERT WITNESSES—When questions put to, need not be framed hypothetically..... 204

F

FACTORS—Have lien upon goods in their possession..... 196
FELLOW-SERVANTS—When engineer and fireman of a switch engine are not..... 647
FENCES—Duty of railroad to keep in repair..... 27
FIXTURES—Pass by deed of land to party without notice of agreement between grantor and lessee..... 510
FORCIBLE DETAINER—Defendant can not set up any cross-demand..... 490
FORECLOSURE—Interest allowed on mortgage note by decree of 589
Where freehold is involved in..... 62
FORFEITURES—Burden of proof upon one claiming 283
Not favored by the law..... 331
FRANCHISE—Owner is liable for negligence of those whom it allows to use it..... 400
Agreement of street railroad company to pave street in return for consent of abutting owners to construction of road is legal..... 572
FRAUD—Is never presumed.....187, 433, 634
What is necessary to impeach a conveyance..... 433
Destructive effect upon a contract..... 373
Concurrent jurisdiction of equity and law..... 373
FRAUDULENT CONVEYANCES—Debtor and creditor..... 99
Presumptions arising from relation of parties to..... 5
FREEHOLDS—Involved in an attempt to compel owner of land under a river to lower its tunnel therein..... 439
Title to real property may be determined in an action of trespass *quare clausum fregit*..... 454
When it is involved..... 62
Where it is involved in foreclosure proceedings—Homestead.. 62

G

GARNISHMENT—Chap. 62, Sec. 4, R. S..... 611
When person summoned as a garnishee fails to appear..... 611
GENERAL INCORPORATION ACT—Intention is that subscribers to capital stock should be persons of financial responsibility..... 496
GENERAL ISSUE—Evidence admissible under, in actions *ex delicto*..... 1

H

HABEAS CORPUS—Order of discharge not a final order..... 316
HOMESTEAD—Where it is involved in foreclosure proceedings—Freehold..... 62
HUSBAND AND WIFE—One as witness for the other.....213, 653
HYPOTHETICAL QUESTIONS—When questions put to medical experts need not be framed hypothetically..... 204

I

IMPEACHMENT—Nature of questions put to witness called to impeach another..... 626
New trials will not be granted for purposes of..... 653
INJUNCTIONS—Issued without notice—Right of objection..... 289
Will not issue to interfere with the board of trade while regularly engaged in an investigation in pursuance of valid by-laws..... 289
What a motion to dissolve on the ground of insufficiency of the bill admits..... 290
When the act or thing threatened is a nuisance *per se*..... 559
Where notice must be given..... 580
INSTRUCTIONS—Where the evidence is conflicting..... 123
Leaving out element of authority of officer to act 123
Where the court might have directed the verdict which was returned..... 87
Circumstantial evidence..... 104
Invading province of the jury..... 104
Appellate Court must review although no motion for a new trial appears in the bill of exceptions..... 65
Submitting a question of law to the jury..... 43
That mortgage is not invalidated by an agreement between the parties that the mortgaged property may be sold..... 32
That because plaintiff mentioned purpose for which he bought materials defendant warranted them for such purpose..... 175
Where evidence upon which a recovery is asked is slight..... 462
Where evidence is evenly balanced..... 462
Court may in giving, assume a fact as proven which is assumed by the parties..... 314

INSTRUCTIONS. *Continued.*
Substitution of word "negligence" for word "fault" 314
As to drawing inferences 314
Plaintiff adopting an extra hazardous method 595
Party may have the jury instructed as to the issues and the law bearing upon his theory of the case 631
Declaring liability or freedom from liability 579
Referring to case as alleged in the declaration 579
Telling the jury they should consider the evidence "in the light of the knowledge which you have obtained as men of affairs" 626
Signaling out one prominent fact and ignoring others 5
That no presumption arises from relationship of parties to alleged fraudulent sales 5
That the father and son, in their dealings with each other, are upon the same footing as persons who are strangers 5
Apparent intelligence or lack of intelligence of witnesses 652
Testimony of husband in behalf of wife 653
INSURANCE—A contract of indemnity 471
Contract to be liberally construed 471
When formal proofs of death are unnecessary 471
Where the subordinate lodge is the agent of the supreme lodge 471
Construction of laws of the order 471
Society having money in its possession belonging to member, and the power to apply it, must pay out of such money assessments due from such member 331, 471
Where member of beneficiary order contracts that he will be bound by the laws of the order which might afterward be enacted 267
Prima facie case in suit on a benefit certificate 267
Acts constituting a waiver of the condition requiring proof of loss 283
Death by suicide, sane or insane 159
Knowledge of agent is knowledge of the company 143
INTEREST—Privilege of exacting a higher rate than is allowed by the general statute concerning interest 618
When recoverable 510
Allowed on mortgage note by decree of foreclosure 589
INTOXICATING LIQUORS—Ownership when sent C. O. D. by express 119

J

JUDGMENTS—Motion in arrest of, when there is one good count 16
Rendered by a person possessing no judicial powers—Appeal from 46
Practice in Appellate Court where they have been erroneously entered 638
Power of court over, at subsequent term 242

JUDGMENTS. *Continued.*
Power of court to make them payable out of a special fund.. 406
Conclusiveness of..... 406
Record includes the terms of a written obligation set forth upon the docket..... 406
Turns upon those things concerning which there necessarily must have been adjudication..... 454
Matters not concluded by..... 454
Where there is no verdict as a basis for..... 487
Only persons parties to, need be summoned in taking an appeal 625
JUDGMENT BY CONFESSION—May be opened upon application of any defendant having a meritorious defense..... 77
JURISDICTION—Question raised on motion to dismiss suit..... 46
Concurrent jurisdiction of equity and law on fraud..... 373
JURY—Province to decide upon credibility of witnesses..... 267

L

LANDLORD AND TENANT—Trade fixtures must be removed on or before the expiration of the lease..... 510
Action of tenant kept out of possession by one holding the paramount title..... 585
LEVEE ACT—Appeals under..... 28
LIBEL—Defined..... 170
Exemplary damages in..... 170
LIENS—Factor has a lien upon goods in his possession..... 196
Priority of—Mortgages..... 321
LIS PENDENS—Three things essential to the doctrine..... 657
Defined..... 657
Does not apply to sales of stock..... 657

M

MALICE—Meaning of, as used in Chap. 72, Sec. 2, R. S..... 481
MANDAMUS—There must be a clear case.....406, 657
Equitable defense can not be set up as against a plain legal right..... 657
MASTER—When his finding will not be disturbed..... 618
MASTER AND SERVANT—Servant wantonly selecting the more hazardous of two methods..... 595
Servant assumes the ordinary hazards of the employment.... 221
Servant may assume that appliances furnished are sufficient for their purpose..... 261
Servant may remain in employ of master for a reasonable time awaiting remedy of defects..... 262
Where danger of continuing use of tool is imminent..... 262
Where servant fails to use appliances furnished him..... 92

MECHANICS' LIENS—Statutory requirements..... 358
Where contract is verbal..... 358
MISTAKE—A mental condition..... 536
Must be material to transaction to entitle a party to relief.... 536
Only reasonable diligence required 536
MORTGAGES—When contemporaneous parol agreements not included in mortgage may be shown..... 32
Third party may prove fraudulent intention of parties..... 32
Priority of lien 321
What must be shown in order to impeach a chattel mortgage. 634
Deed may be shown to be..... 283
Interest allowed on note by decree of foreclosure..... 589
Execution not a change of title..... 283
Instruction that it is not invalidated by an agreement between the parties that mortgaged property may be sold..... 32

N

NEGLIGENCE—By reason of which damages can be recovered.. 221
Owner of franchise is liable for the negligence of those whom it allows to use it..... 400
Happening of accident in passenger elevator raises a presumption of..... 545
Servant assuming obvious dangers..... 595
Fact that sparks from locomotive set fire is a *prima facie* case of.....25, 67
Backing cars upon crossing while another train is passing.... 111
Sounding whistle while passing under an overhead bridge upon which a buggy is passing..... 69
Actions given to personal representative of deceased for death by negligent act..... 1
A question for the jury..... 16
NEW TRIALS—Character of newly discovered evidence..... 545
Where newly discovered evidence is merely cumulative..... 545
Will not be granted for purposes of impeachment..... 653
Objections not made in motion for, are waived..... 170
Appellate Court must review instructions even where no motion for, appears in the bill of exceptions..... 65
NOTICE—Of application for an injunction, where it must be given..... 530
Election to declare principal note due for a breach of condition..... 671
NUISANCE—Ordinance declaring that a nuisance which is not... 120
What use of property creates..... 559
Erection of an unsightly structure is not..... 559
Character when in doubt must be established in an action at law..... 559
When claim to relief is based upon the use to be made of a building erected upon one's own ground..... 559

NUISANCE. *Continued.*
Injunctions when the act or thing threatened is a nuisance *per se*..... 559
Equity jurisdiction over the subject of..... 560

O

ORDINANCES—Declaring that a nuisance which is not a nuisance..... 120
Privilege of streets need not be granted to company by ordinance..... 146
Part void and part valid..... 37

P

PARENT AND CHILD—Presumptions applying when they deal with each other..... 5
PAROL EVIDENCE—Competent to show the consideration different from that expressed in the deed..... 154
PARTNERS—When statute of limitations begins to run as between..... 640
Where only partner has been served in a suit brought upon a joint obligation..... 625
PARTNERSHIP—Not a legal entity..... 326
PASSENGER ELEVATORS—Liability of person operating is the same as that of a common carrier..... 544
Happening of an accident raises a presumption of negligence. 545
PHOTOGRAPHS—When admissible in evidence..... 191
PLEADING—What a motion to dissolve an injunction on the ground of insufficiency of the bill admits..... 290
Taken most strongly against the pleader..... 290
Objections to evidence do not relate to errors in settling..... 75
Pleas in abatement..... 485
Not necessary that the declaration should describe injuries as permanent..... 545
It is not necessary to charge in specific terms a duty..... 595
PRACTICE—Where but one partner has been served in a suit brought upon a joint obligation..... 625
It is the peculiar province of the jury to determine the preponderance and credibility of the evidence..... 615
Where the master's finding has been approved by the chancellor..... 510
Where there is no verdict as a basis for a judgment..... 487
Filing additional plea—Statute of limitations..... 353
Judgment not reversed for technical error..... 413
When the statute of limitations begins to run, where two remedies for the same relief accrue at different times..... 272

PRACTICE. *Continued.*
Where juries have found three times the same way..... 394
Court is presumed to have complied with its own rules..... 236
Where exceptions are not taken to action of trial court.....213, 413
Assignee of chose in action must sue in name of assignor..... 196
Waiver of tort by bringing action in attachment..... 196
Objections not made in a motion for a new trial waived....170, 236
Where the findings of the master are approved by the chancellor..... 342
Court may, in giving instructions, assume a fact as proven which is assumed by parties..... 314
Power of court over judgment rendered at prior term..... 242
Court will be presumed to have done its duty..... 243
When defendant rests his defense upon a fact which is not included in the allegations necessary to support the plaintiff's case..... 267
Setting aside defaults rests largely in the legal discretion of the trial court..... 246
Objection to evidence does not relate to errors in settling the pleadings..... 75
Extension of time in which to present an amended affidavit of merits..... 117
Where party may have the damages assessed by a jury..... 117
Plea to declaration supported by affidavit of merits..... 117
What evidence is admissible in actions *ex delicto* under the general issue..... 1
Questions of jurisdiction raised by motion to dismiss suit..... 46
Contract limiting liability of common carriers need not be specially pleaded as a defense to an action for damages..... 54
Where case has been tried twice by a jury..... 14
Object of arguments to juries..... 16
Motion in arrest of judgment where there is one good count... 16
PRESUMPTIONS—No presumption of fraud.....433, 634
Account stated sent to defendant in the usual and customary way..... 615
That the proceedings of court are regular..... 367
Of negligence—Happening of accident in passenger elevator raises..... 545
That court has done its duty..... 243
Arising from relationship of parties to fraudulent sales..... 5
PROBATE COURTS—Appeals from, are retried *de novo*..... 369
PROCESS—When sheriff is protected in making arrest..... 316
Effect of technical defects after party has submitted himself to the jurisdiction of the court..... 413
PROMISSORY NOTES—Duty of maker to take up his paper..... 626
When demand of payment is necessary..... 626
Made payable at a particular place—Demand..... 626
Purpose for which given..... 130

PROXIMATE CAUSE—Defined 647
PUBLIC IMPROVEMENTS—Damages caused by 97

Q

QUESTION OF FACT—May be submitted to a jury by the chancellor 180
Dedication 65
Witnesses should be confined to 594
Negligence 16
QUO WARRANTO—To determine question of legal organization of corporations 604

R

RAILROADS—Fact that fire is set by sparks from locomotive makes a *prima facie* case of negligence 25, 67
Burden is upon company to show due care 67
Negligence in sounding a whistle while passing under an overhead bridge upon which a buggy is passing 69
Plaintiff must prove that deceased was exercising ordinary care to avoid injury 37
Liability of owner of property devoted to public use 218
Duty to keep fences in repair 27
Negligence in backing cars upon crossing while another train is passing 111
Right under police power to require them to elevate their tracks 217
Easement of public in their right of way 217
Owner of franchise is liable for negligence of those whom it allows to use it 400
RATIFICATION—Made only upon full knowledge of the material facts 224
REAL ESTATE BROKERS—Interference of owner with broker in negotiating sale 151
RECEIVERS—Appointment *pendente lite* a matter of discretion .. 445
What plaintiff must show 445
Court of equity proceeds with caution against a defendant in possession 445
Appointment must be necessary to preserve some particular property for such parties as shall be entitled to the benefit thereof 446
Where party in possession is insolvent and plaintiff's claim is not clear 446
Power of appointment should be cautiously exercised 446
As against one in possession—When one will be appointed ... 446
REFUNDING BONDS—Administrators 369
RELEASE—Of claim by sole beneficiary 1

REPLEVIN—*Res judicata*..... 213
RESCISSION OF CONTRACTS—Condition of affairs must be such that a substantial restoration can be made..... 536
RES JUDICATA—Replevin..... 213
Upon what the doctrine rests..... 454
Judgment turns only upon those things concerning which there necessarily must have been adjudication..... 454
Matters not concluded by judgment..... 454
REWARDS—Rule as to payment based upon the principle applicable to contracts..... 255
One claiming a reward for doing a certain thing must have known of reward..... 255

S

SALES—Rule of *caveat emptor*..... 107
Acquiescing in false statements of auctioneer..... 108
Seller reserving title to property may assert it at any time.... 130
Delivery of goods to carrier vests title in vendee..... 120
SEDUCTION—Evidence of, admissible in actions for breach of promise of marriage..... 249
SIDEWALKS—Evidence of condition of, at a time subsequent to the injury..... 191
That another person has subsequently been injured by..... 191
SLANDER—Evidence supporting a verdict..... 114
What is, under the statute..... 9
When several statements taken together amount to charging plaintiff with adultery..... 9
Repetition of offense may be shown in aggravation..... 170
SOLICITOR'S FEES—In partition proceedings—Defense required to prevent the apportionment of costs..... 386
What the court may take into consideration in determining.. 386
Decree may be entered in favor of the solicitor not a party to the suit..... 386
Reversal of decree in Circuit Court does not affect order to pay..... 363
Court may form an independent judgment as to the amount. 349
SPECIFIC PERFORMANCE—Relief is within the discretion of the court..... 495
Of an agreement to organize a corporation..... 495
Equity will enforce contract in all its parts..... 495
STATUTES—Who may file bill under section 25 of the corporation act..... 272
Liability of stockholders under section 25, of the corporation act..... 272
Application of term "After exhausting the assets of the corporation" in section 25 of the corporation act..... 272
Section 117, Ch. 3, R. S., construed..... 369

STATUTES. *Continued.*
Section 220 of the Criminal Code 525
Sec. 18, Ch. 110, R. S 485
Par. 53, p. 1116, Hurd's Stat. 1901, applies only to money demands 490
Section 40, Chapter 106, R. S., construed 386
Sec. 53, Art. 9, of the Municipal Incorporation Law—Construction of word "costs." 353
Chapter 70, R. S., construed 1
Sec. 10, Ch. 96, R. S 187
Purpose of Chapter 95, Par. 27, R. S 164
STATUTE OF LIMITATIONS—Equity follows the law 271
A statute of repose 271
Where a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto 271
When it begins to run as between partners 640
Practice 353
STOCK—Recital in certificate that the stock is "fully paid and non-assessable." 342
Right of purchaser to rely upon recitals in certificate 342
STREET RAILROADS—Superior right to portion of street occupied by tracks 579
SUICIDE—Death by, sane or insane—Insurance 159

T

TAX SALES—Certificate of redemption competent to show sums paid for redemption from 589
TENDER—Of books under contract 427
TORTS—Waiver of by bringing action in attachment 196
TRADE FIXTURES—Must be removed on or before the expiration of the lease 510
TRADE-MARKS—Public are entitled to protection 525
Right of a corporation to the use of its name 525
TRESPASS—*Quare clausum fregit*—Title to real property may be determined in 454

U

USAGE—How it must be established 224
USURY—Loaning funds of building association without complying with the statute 618

V

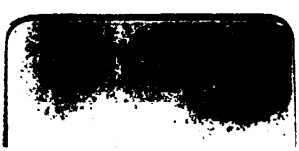
VENDOR AND VENDEE—Where vendee relies upon superior knowledge of vendor 76

VERDICTS—Duty of the Appellate Court to set aside if the result of passion or prejudice..... 168
Where reviewing courts will not disturb..... 52
Where there is no verdict as a basis for a judgment..... 487
Where evidence is sufficient to sustain it, it will not be reversed..... 102
Right of prevailing party where court is asked to set aside.... 615
Manifestly against the weight of the evidence..... 518
Appellate Court may always consider the sufficiency of the evidence to support..... 462
Erroneous instructions where the court might have directed the verdict returned..... 87
Evidence supporting—Slander..... 114
VESTED RIGHTS—Of company in privileges granted to it in streets..... 146
VOLUNTARY ASSIGNMENTS—No other court can interpose when the jurisdiction of the County Court has once attached. 667
Assignee is trustee for creditors..... 667
Degree of care to be exercised by assignee..... 667

W

WAIVER—Of tort by bringing action in attachment..... 196
Of objections not made in the trial court.....170, 236
Of condition requiring proof of loss—Acts constituting..... 288
WARRANTY—Of materials for purpose bought—Instructions.... 175
WILLS—Statutory requirements..... 40
Sufficient document..... 40
WITNESSES—Competency of defendants to testify concerning transactions between themselves and a deceased payee of a note..... 155
Instruction as to apparent intelligence or lack of intelligence of..... 652
Should be permitted to testify to the facts only..... 594
Wife for husband..... 213
When questions put to medical experts need not be framed hypothetically..... 204
Province of the jury to decide upon the credibility of..... 267
The question put to the witness called to impeach another should be substantially identical with the original question. 626
WORDS AND PHRASES—Alimony defined..... 182
Construction of word "costs"..... 853
The gist of the action..... 481
Meaning of "malice" as used in Chap 72, Sec. 2, R. S..... 481
Substitution of word "negligence" for word "fault" in instructions..... 314
Bona fide purchaser..... 414
Eviction defined..... 585

WORDS AND PHRASES. *Continued.*
Lis pendens defined..... 657
Proximate cause defined..... 647
Libel defined..... 170
"After exhausting the assets of the corporation"..... 272
WRITTEN INSTRUMENTS—Construction, where there is an obvious mistake made on the face of the instrument..... 502

E. J. M.

5564 030